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AMERICAN GOVERNMENT AND POLITICS

BY

CHARLES A. BEARD

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PREFACE

THE several excellent manuals on American Government now available are written primarily for high schools, and there seems to be room for a volume, not too elementary nor yet too technical, designed for college students and for citizens wishing a general survey of our political system. This volume, taken in conjunction with the companion work, *Readings in American Government and Politics* (cited in the footnotes as *Readings*), is intended to fill this gap. It is not a contribution to political literature, but is frankly based upon the best authorities of recent times.

I have many personal debts to acknowledge. My colleagues, Professors Dunning, Goodnow, Munroe Smith, Shepherd, and G. W. Scott, and Mr. Sait have read portions of the manuscript or proof, and have given firmness to every page they have touched. Dr. Howard McBain has read the parts on Federal and State Government, and through his extensive knowledge of practical politics and administration I have been saved many slips. I am also indebted to him for innumerable corrections in perspective and interpretation. Professor A. R. Hatton has read the chapters on Municipal Government and, in addition to making a number of rectifications, he has shown me how much better they could have been done. Mr. Arthur Crosby Ludington has aided me materially with ballot and primary legislation. Mr. Alexander Holtzoff has helped me at every point in the making of the volume; two chapters, on National Resources and the State Judicial System, were drafted by him under my direction; and I owe him a debt which no mere line in a preface can pay. In planning and executing the work, I have had the constant and discriminating assistance of my wife. Notwithstanding all this coöperation, I must take the

burden of responsibility for errors and shortcomings. Only one who has gone over the same ground can appreciate how many there are; but I trust they will be viewed with charity by those who know how difficult a thing it is to describe a complex political organism which is swiftly changing under our very eyes.

CHARLES A. BEARD.

COLUMBIA UNIVERSITY,
April, 1910.

PREFACE TO THE REVISED EDITION

The call for a revision of this volume came unexpectedly at the opening of a busy academic year, and I was not able to undertake a leisurely re-writing of the entire work in accordance with my present ideal of a college text. I have confined myself largely to the task of recording the leading changes of the last four years; but in doing this I have materially reduced the details and references to matters of a local and temporary interest, with which the first edition was overloaded. I have furthermore recast several sections in such a manner as to emphasize broad tendencies and general principles. The necessity for including a mass of data on current practices, destined to become obsolete soon, is no longer imperative, because students now have an annual survey, *The American Year Book*, to which they can turn for the latest grist of constitutional amendments, statutes, and party programmes.

I am indebted to Professor C. A. Dykstra, Dr. Louis A. Mayers, Professor B. F. Moore, and Professor T. R. Powell for pointing out errors in the first edition, and I shall be grateful to learn of mistakes which have escaped me in this revision.

CHARLES A. BEARD.

November, 1913.

PREFACE TO THIRD EDITION

In this edition I have followed the lines of the revision of November, 1913. I have vainly hoped for, but not yet found, leisure in which to recast the entire text. The continued demand for the book is some proof that it serves many people in its present general form, and therefore I venture, for a while longer, to let the main structure stand just as it was conceived ten years ago. I have, however, eliminated a large mass of details.

In the preparation of this edition I am specially indebted to Professor James D. Barnett, of the University of Oregon. I only regret that the limitations of the revision made it impossible for me to incorporate every one of his wise and fruitful suggestions. I am also under heavy obligations to my friend, Mr. Louis B. Blachly of the Research Staff of the New York Merchants' Association.

CHARLES A. BEARD.

New York,
May, 1920.

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AMERICAN GOVERNMENT AND POLITICS

PART I

HISTORICAL INTRODUCTION

CHAPTER I

COLONIAL ORIGINS OF AMERICAN INSTITUTIONS

American government did not originate in any abstract theories about liberty and equality, but in the actual experience gained by generation after generation of English colonists in managing their own political affairs. The Revolution did not make a breach in the continuity of their institutional life. It was not a social cataclysm, the overthrow of a dominant class, the establishment of a new estate in power. It was rather an expansion of the energy of the ruling agricultural and commercial classes, that burst asunder the bonds with which the competing interests in England sought to restrain their growing enterprise. American shipwrights could build vessels as fleet and strong as any that sailed the seas, and they were determined to conquer by main strength a free place in the world's market. American merchants were as ingenious as those who made England the nation of shopkeepers, and they could ill brook the restraints which condemned them to buy important staples in the marts of Great Britain. America was rich in timber, raw materials, and mineral resources, and American manufacturers chafed under laws compelling consumers to look beyond the seas for commodities which might well have been made in New England or Pennsylvania. It was discontent with economic restrictions, not with their fundamental political institutions, which nerved the Revolutionists to the great task of driving out King George's governors, councillors, judges, revenue-officers, and soldiers. The American Revolution, therefore,

was not the destruction of an old régime, although it made the way for institutional results which its authors did not contemplate; and it was not motived by the levelling doctrines with which the French middle class undermined the bulwarks of feudalism.[1]

There had long been executive, legislative, and judicial offices in all of the colonies, and the Revolutionists merely took possession of them. Unlike the French popular party, they did not have to exercise their political ingenuity in creating any fundamentally new institutions. The Revolutionists of Rhode Island and Connecticut, where the governors, councillors, and judges were not appointed by the crown, found their ancient systems of government, based on seventeenth-century charters, so well suited to their needs and ideals that they made no alterations beyond casting off their allegiance to the King of Great Britain. The royal charter granted to Connecticut by Charles II in 1662 remained the constitution of that commonwealth until 1818; and the charter of the neighboring state of Rhode Island, granted in 1663, remained in force as the fundamental law until 1842. The distribution of representation, the suffrage, the qualifications for office-holders, and the legislative, executive, and judicial institutions of old English origin were continued after the Revolution without many radical alterations.

Even the federal Constitution, in spite of Mr. Gladstone's high praise that it was the most wonderful work struck off at a given time by the brain and purpose of man, was based as far as possible on the experience of the colonies and the states. The very names applied to the Senate, House of Representatives, and President were taken from the institutions of some of the states, while many clauses of the Constitution, such as those providing the process of impeachment, the presidential message and veto, the origin of money bills in the lower house, and the freedom of each house to determine its procedure under certain limitations, were taken almost verbatim from state constitutions.[2] The powers which the Convention of 1787 vested in

[1] Compare, for instance, the following chapter with the account of the institutional reforms of the French Revolution in Robinson and Beard, *Development of Modern Europe*, Vol. I, chaps. xi and xii.

[2] For a study of the sources of the federal Constitution, see Robinson, *Original and Derived Factors of the United States Constitution*, and the note

Congress were scarcely experimental, for six years' practical experience with the shortcomings of the Articles of Confederation had taught statesmen the inexorable necessity of giving the national government those very powers, and limiting the states in the exercise of the authority which they had previously enjoyed.[1] Nor must it be forgotten that the right later assumed by the Supreme Court to pass upon the constitutionality of laws and declare them void had already been exercised by many state courts.[2]

The dictum of Stubbs that the roots of the present lie deep in the past has now become commonplace; but it is true of American institutions in a very peculiar sense, for they are founded on *written* documents which, in spirit and form, bear the impress of the political and economic conditions prevailing at the time of their creation. Many state constitutions still reveal distinct traces of Revolutionary days, and the written letter of the federal Constitution, notwithstanding the eighteen amendments and the revolution wrought by the Civil War, remains unchanged so far as the machinery of government and the powers of its three departments are concerned. It is, therefore, from American history alone that one can learn, for instance, why there are two Senators from each state, why the system of checks and balances, so characteristic of American institutions, was adopted, why the President is chosen through an elaborate electoral system, why interstate commerce powers are vested in the federal government, or why certain political practices have sprung up in the attempts to operate our governments, national and state.[3]

The Colonial Governor

On the eve of the Revolution there were thirteen colonies in America — each with its separate institutions[4] and its peculiar

to chap. iv of Bryce, *American Commonwealth*, Vol. I, taken from Johnston's article in the New Princeton Review, September, 1887.

[1] See an illuminating article on this point by Professor Max Farrand, in the American Political Science Review for November, 1908.

[2] Early cases illustrating the power of the courts to declare state laws invalid on constitutional grounds are to be found in Thayer, *Cases on Constitutional Law*, Vol. I, pp. 48 ff. See also Professor Charles G. Haines' valuable work, *The American Doctrine of Judicial Supremacy*.

[3] Goodnow, *Politics and Administration*, especially chap. ii.

[4] Delaware was under the proprietor of Pennsylvania.

traditions, many of which, it is instructive to remember, were then older than are our national traditions to-day. In form of government, however, especially in its higher ranges, the colonies presented striking similarities. Each had a governor, an assembly, and a judicial system, and the Common Law of England, as far as it was applicable and had not been changed by legislation, was binding everywhere.

In eight of the colonies, — Georgia, North Carolina, South Carolina, Virginia, New Jersey, New York, New Hampshire, and Massachusetts,[1] — the governor was appointed by the king and recognized as the king's personal deputy.[2] He occupied a twofold position. On the one hand, he was the representative of British interests in the colony — the agent through whom the will of the British government was made known to the inhabitants, and the guardian who kept the crown informed on the state of the province. On the other hand, he was the highest executive official in the colony, charged with the conservation of the peace and advancement of the welfare of the colonists.[3] As a contemporary writer put it: "the crown delegates to the governor for the time being all its constitutional power and authority, civil and military — the power of legislation so far as the crown has such — its judicial and executive powers, its powers of chancery, admiralty jurisdiction, and that of supreme ordinary." [4]

As the chief executive, he supervised the enforcement of the laws and appointed, usually in connection with the advice of his council, the important civil officers. He could remove councillors[5] and officials for cause, and direct them in administration. By virtue of his position as chancellor, he was head of the highest court in the colony, which entertained appeals from lower tribunals and exercised important original jurisdiction in many

[1] For Massachusetts' peculiar position, below, p. 5.

[2] See *Readings*, p. 2, for a royal governor's commission.

[3] Greene, *The Provincial Governor*, chap. iv, p. 65.

[4] Thomas Pownall, *The Administration of the Colonies*, pp. 85–86. The term "supreme ordinary" applies to the powers of the king as head of the Church of England. The royal governor was commissioned by the crown and commonly styled, "Captain-General, and Governor-in-Chief in and over the Province, and Chancellor, Vice-Admiral, and Ordinary of the same."

[5] Not in Massachusetts.

matters. Moreover, he granted pardons and reprieves. He was commander-in-chief of the colonial forces, appointed the military officers of high rank, levied troops for defence, and enforced martial law in time of invasion, war, or rebellion. As the king's ecclesiastical representative, he collated to churches and benefices.

In connection with the colonial legislature, the royal governor also enjoyed extensive powers. In all of the eight colonies mentioned above, except Massachusetts, he nominated the council which composed the upper house of the legislature. He summoned, adjourned, and dissolved the assembly; he laid before it projects of law desired by the home government; and he vetoed laws which he thought objectionable. He was thus endowed by law with high authority, and often increased his political influence through his power of appointing local sheriffs who were the constituting officers at elections for the assembly. In short, the royal governor enjoyed such high prerogatives in colonial times that the first state constitution-makers, having learned by experience to fear executive authority, usually provided for the supremacy of the legislature and gave their governors very little power.[1]

The royal governor, however, was by no means an unlimited sovereign in his province, for he was bound by his instructions and by the restraints which the assembly imposed through its power of controlling the grants of money. Indeed, in the innumerable disputes which fill colonial history, the assembly usually triumphed over an obstinate governor because it was able to keep a firm grip on the purse-strings. Toward the eve of the Revolution, his appointing power was curtailed by the claims of the council to a share in the distribution of patronage. Moreover, complaints against his actions often went to the Board of Trade,[2] while appeals from his decisions lay to the king in council across the sea.

Unlike the other colonies which had governors appointed by the king, Massachusetts had a charter that set forth, among other things, the general organization and powers of the legislature. The governor could adjourn, prorogue, and dissolve

[1] See below, p. 87.

[2] Whitney, *Government of the Colony of South Carolina*, pp. 39–40.

the assembly, but he could not appoint the council, or upper house, and he could choose the civil officers only with its consent. However, he enjoyed considerable military authority; he organized the militia, appointed the chief officers, commanded the armed forces, and declared martial law in case of rebellion or invasion. Naturally this division of authority invited conflicts, and it so happened that Massachusetts led the way in throwing off all royal authority.

In Rhode Island and Connecticut the governor occupied a peculiar position. In the first place, he was elected annually by a general assembly composed of the governor, assistants, and representatives chosen by the voters in each "city, town, or place." In the second place, the governor did not stand out as a distinct official; he was little more than a figurehead, his functions being discharged only in coöperation with his assistants, or councillors. In each of these colonies, the governor and assembly were duly authorized to make all necessary laws and ordinances and manage corporate business with a large degree of freedom.[1] There was accordingly no separation of legislative and executive powers as in the royal provinces, and the governor was constantly controlled in his office by the advisers who, like himself, were chosen by the general assembly. Furthermore, he enjoyed no veto power over legislation.[2]

The executive authority in the proprietary colonies of Maryland and Pennsylvania and Delaware [3] stood on a different basis from that in the royal provinces or in Connecticut or Rhode Island. Each of the former was, as Professor Osgood points out, "a miniature kingdom of a semi-feudal type and the proprietor was a petty king." Each was a vast estate carved out of the royal domain and granted by the crown to a proprietor who, in theory at least, combined the rights of government with those of landlord, from which he derived large revenues. When the proprietor of Pennsylvania was in his province, he assumed executive au-

[1] For an extract from the Rhode Island Charter, *Readings*, p. 7.

[2] The governor of Rhode Island was given the veto power in 1909.

[3] Delaware was united to Pennsylvania under the proprietorship of Penn in 1682, and until 1704 the two colonies had a single legislature. In the latter year, however, separate legislatures were established, although they continued under the same proprietor, who appointed a governor for Delaware to represent himself.

thority himself, but when he was absent he vested it in a lieutenant-governor who served in the capacity of his agent.[1] The Pennsylvania assembly successfully resisted the power of the governor to dissolve or prorogue, and the executive council did not serve as an upper chamber, as was the case in the legislatures of the other colonies, although it did enjoy a somewhat indefinite influence over legislation.[2] In Maryland, "the proprietary held the title to all the land, was captain-general and head of the Church. All patronage, lay and clerical, amounting to fourteen or fifteen thousand pounds a year — from the governor with a salary of fifteen hundred and fifty pounds down to the naval officers and sheriffs — was in his hands. He had a negative upon all laws, and the power of pardon. To the proprietary belonged all the quit-rents, the tobacco and tonnage duties, and the legal fines and forfeitures, although the assembly vigorously resisted this last source of emolument. . . . To the governor, who was appointed by the proprietary, the exercise of all these sovereign powers was, as a rule, entrusted. The governor represented the proprietary in the province, summoned, prorogued, and dissolved the assembly, and assented to laws. He also claimed a veto on legislation, but this right was not admitted by the Burgesses. He made all appointments to office, issued pardons, signed the warrants for execution, and exercised great political influence."[3] Nevertheless, under its power to control money grants, the popular branch of the legislature in Maryland succeeded, toward the Revolution, in securing a tolerably effective control over the governor in the exercise of these large powers.

Colonial Legislatures

In all of the colonies, except Pennsylvania, there were two branches of the legislature, and only in Massachusetts, Connecticut, and Rhode Island, was the upper house — to use the term in a general sense — elective. In these three New England colonies, the councillors, or assistants, as they were called, were chosen by the general assemblies, and thus did not occupy the

[1] W. R. Shepherd, *History of Proprietary Government in Pennsylvania* (Columbia University Studies), p. 474.

[2] *Ibid.*, p. 321.

[3] Lodge, *English Colonies in America*, p. 113.

same position of independence over against the representative branch, as did the councillors of the royal colonies. In the provincial colonies, the upper house, or council, was chosen by the king acting through the royal governor, who usually determined the selection himself. In the proprietary colonies, the proprietor or his representative selected the councillors.

In addition to the usual legislative powers, that is, the right to discuss and vote on laws, the council had executive and judicial functions. It advised the governor; in conjunction with him it formed a judicial tribunal; it frequently controlled him in making appointments; and it discharged many of the official duties now vested in higher state officers, such as the secretary and treasurer. In Massachusetts, the governor and council appointed civil officers; in South Carolina the governor had to secure the approval of the council before taking any important action or making an official appointment; in Rhode Island the assistants shared the executive power of the governor; and in New Jersey it was only with the consent of the council that the governor appointed judges and civil, ecclesiastical, and military officials. Where the council was elected it tended to merge with the legislature; in Pennsylvania, where it was the proprietor's advisory board, it lost almost all legislative power, and in the royal provinces it became an aristocratic body, sympathizing generally with the governor and king in the contests with the representative branch of the government.

In every colony there was an assembly of representatives chosen by popular vote, but, contrary to common impressions, there was nothing like universal manhood suffrage.[1] In New York, for example, voters for members of the assembly — the lower branch of the legislature — were required to be freeholders of lands or tenements to the value of forty pounds free from all encumbrances, except that in New York City and Albany the suffrage was open to all freemen — that is, all men who had been regularly admitted to civic rights.[2] In Virginia the voter had to be a freeholder of an estate of at least fifty acres of land, if there was no house on it; or twenty-five acres with a house twelve feet

[1] Reference: A. E. McKinley, *The Suffrage Franchise in the Thirteen English Colonies*, University of Pennsylvania Publications — the standard authority on this problem.

[2] For a fuller explanation of this term, see McKinley, *ibid.*, pp. 208 ff.

square; or, if a dweller in a city or town, he had to own a lot or part of a lot with a house twelve feet square. In Massachusetts the voter for member of the legislature, under the charter of 1691, had to be a freeholder of an estate worth at least forty shillings a year, or the owner of other property to the value of forty pounds sterling. In Pennsylvania the vote was restricted to freeholders of fifty acres or more of land "well seated" and twelve acres cleared, and to other persons worth at least fifty pounds in lawful money.

As a result of these property qualifications, a considerable portion of the adult males were excluded from any share in the government. Exact statistics are difficult to obtain, and the following figures are given by Dr. McKinley merely by way of illustration. He estimates that in New York City the voting class included from one-ninth to one-fourteenth of the total population, and that two-fifths of these electors were not owners of property, but voted as freemen of the city. Taking some scattered figures for mid-century elections in Virginia, he places the voting population at from seven to ten per cent of the white inhabitants, and concludes that "the franchise was more widely exercised, if not more widely conferred, in Virginia than in the more Northern colonies." In Boston during the period from 1745 to 1754 the number of voters averaged about three per cent of the population, but this was partially due to the fact that many duly qualified voters were ordinarily inactive, for on one occasion at least six and one-half per cent of the inhabitants took part in an election. In the rural districts of Pennsylvania about one out of ten of the population could vote, while in the city of Philadelphia the fifty-pound qualification disfranchised so many inhabitants that, according to the tax list, only one in fifty possessed the suffrage.

In conclusion, Dr. McKinley says: "In New York City in the elections of 1735, 1761, and 1769, the actual voters numbered about eight per cent of the population. In Pennsylvania the tax list figures give only the potential voters, but they show about eight per cent of the rural population qualified for the suffrage and only two per cent in the city of Philadelphia, a condition quite in contrast to that of New York City. In New England the actual voters appear to be less proportionately than in the middle and southern colonies. Massachusetts, for instance,

shows only one person in fifty as taking part in elections, and Connecticut, in elections immediately preceding the Revolution, had about the same proportion. In Rhode Island the freemen or potential voters numbered only nine per cent of the population. These figures are entirely too few and too scattered in time and territory to justify any accurate generalization from them. The potential voters seem to vary from one-sixth to one-fiftieth of the population, and the actual number of voters shows almost an equal variation; Massachusetts and Connecticut showing at times only two per cent of actual voters among the population, where perhaps sixteen per cent were qualified electors; and New York City and Virginia showing the far larger proportion of eight per cent of the population as actual voters. At best the colonial elections called forth both relatively and absolutely only a small fraction of the present percentage of voters. Property qualifications, poor means of communication, large election districts, and the absence of party organization combined to make the most sharply contested elections feeble in their effects upon the community as compared with the widespread suffrage of the twentieth century."[1]

Most of the colonies also followed the example of the mother country in imposing special qualifications on members elected to the legislature. In South Carolina, for example, a member had to own five hundred acres of land and ten slaves or be worth one thousand pounds sterling in land, houses, or other property. New Jersey members had to have one thousand acres freehold, while in Georgia delegates were required to own at least five hundred acres of land. In addition to property qualifications, religious tests were usually imposed on assemblymen.

Following the ancient practice of England, representatives were distributed, in colonial times, among distinct territorial districts rather than among equal groups of people. In New England the town was the unit of representation, and only a slight attempt was made to adjust the representation to the population. For example, the charter of Rhode Island stipulated that Newport should send not more than six persons, Providence, Portsmouth, and Warwick four each, and other places, towns, and cities two each. The Massachusetts charter,

[1] *Op. cit.*, p. 487.

while providing that the original assembly should consist of two representatives from each town or place, at the same time authorized the assembly to alter this number at will; and, although the modern democratic principle of equal election districts was not recognized, an attempt was made to give special weight to larger numbers. In the middle colonies, the county was the unit of representation, and, according to ancient English precedent, each county elected its representatives under the supervision of the sheriff as returning officer. In South Carolina representatives were apportioned among parishes, but they varied so greatly in population that the representation was unequal. In general, it may be said, therefore, that the principle of equal representation was not accepted, but that practical considerations led to a very rough attempt to give special recognition to the more populous areas.

The colonial assemblies constantly maintained that they possessed entire and exclusive authority to regulate their domestic concerns.[1] Especially in the matter of taxation did they stoutly assert their exclusive rights not only in formal declarations but also in actual resistance to the royal and proprietary governors. No attempts, however, were made to define and lay down colonial legislative powers in any complete written instruments.[2] Such a procedure was almost unknown to the political practice of England; and no concrete need for it had arisen in the colonies. In the charters, the legislative power conferred was general, not specific. For example, the Massachusetts charter of 1691 provided that the assembly should have "full power and authority from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions, and instructions either with penalties or without (so that the same be not repugnant or contrary to the laws of this our realm of England) as they shall judge to be for the good and welfare of our said province or territory." In addition to this general legislative power, the assemblies usually enjoyed a large control over the executive

[1] Story, *Commentaries on the Constitution* (5th ed.), Vol. II, p. 119.

[2] Some of the legislatures, however, prepared statements of their "rights." New York, for example, did this before the close of the seventeenth century.

department through their power to withhold the salaries of the officials.

Notwithstanding the large legislative power asserted and enjoyed by the colonial assemblies, there were certain legal limitations on their authority. In the provincial and proprietary colonies, the governor exercised the right to veto laws,[1] and in all colonies except Maryland, Rhode Island, and Connecticut laws had to be sent to England for royal approval. Furthermore a special act of Parliament provided that all laws, by-laws, usages, and customs in the colonies repugnant to laws made in England relative to colonial affairs should be null and void. Later, Parliament distinctly asserted that the colonies and plantations in America were subordinate to and dependent on the crown and Parliament of Great Britain, which enjoyed the power and authority to make laws binding the colonies and people of America in all cases whatsoever. A South Carolina court once went so far as to declare an act of the colonial legislature of 1712, taking away the freehold of one man and vesting it in another, null and void on the ground that it was against common right and Magna Charta.[2] At all events the colonists had long been acquainted with both theoretical and practical limitations on their assemblies, so that, after gaining independence, they acquiesced, though not without contest, in the courts' assumption of power to declare laws null and void on constitutional grounds.

The Colonial Judiciary

The lowest colonial courts were those held by the justices of the peace, who were generally appointed by the governor, although in some instances they were elected by local freeholders. In civil matters, these justices had jurisdiction over cases involving small amounts, under five pounds in New York and under forty shillings in Massachusetts. In criminal matters they were competent to try only the pettiest offences against the law. Though they bore the name of ancient local magistrates of England, they enjoyed by no means the same powers, especially in

[1] In Connecticut and Rhode Island the governor did not enjoy the veto power.

[2] Thayer, *Cases on Constitutional Law*, Vol. I, p. 53.

the matters of administration and local government. In Massachusetts, and some other colonies, however, the old English practice of uniting all the justices of the county in a general court of quarter sessions was followed; and this court, in addition to exercising criminal jurisdiction, supervised roads, bridges, inns, and other county affairs which are now usually placed under the direction of county commissioners.[1]

Above the justices of the peace there were usually regular county courts, the judges of which were appointed by the governor, except in New Jersey, where they were elected. Generally speaking, the county court had criminal jurisdiction over all except capital cases, although in Massachusetts criminal matters were turned over to sessions of the justices of the peace. The county courts also had civil jurisdiction in cases involving certain amounts.

Each colony had a high court which decided weighty matters and appeals from the lower courts. In the royal colonies the governor as chancellor and his council generally composed this high tribunal; but in Massachusetts it consisted of a chief justice and four associates appointed by the governor and council. In Pennsylvania the supreme court was composed of a chief justice and three associates, chosen by the governor.

Beyond the highest court of the colony, there lay appeals to the king in council in England, and this power was frequently exercised on the eve of the Revolution. Far from being regarded as an infringement on the rights of colonists, it was esteemed a privilege to be able to lay cases before the members of this tribunal, who were so far removed from local jealousies.[2] It was of course an expensive process, and only cases involving certain amounts could be appealed. In Pennsylvania the amount had to exceed fifty pounds, and in Georgia five hundred pounds, before the case could be carried to the king and his council.

While there were great divergences among the colonies in the organization of the courts and the apportionment of business among them, they thus had certain features in common. The idea of an elective judiciary, unknown to English practice, was not accepted save in some minor instances. The system of

[1] *Readings*, p. 13, on the powers of magistrates in Virginia.
[2] Story, *Commentaries* (5th ed.), Vol. I, p. 127.

appeals to the highest colonial court was universally recognized, and the practice of carrying important cases to a tribunal above all colonial courts was steadily maintained. Consequently, when the colonists were later called upon to organize their own judicial system, they had to make but slight changes in the existing arrangements.

Municipal and Local Institutions[1]

Although there were in the colonies no cities of importance, measured by modern standards, the foundations of American municipal government must be sought in colonial times. It appears that there were about twenty municipal corporations during that period, each of which received its charter from the colonial governor — New York and Albany in 1686, Philadelphia in 1691, and Trenton, New Jersey, the last, in 1746. The form of organization in general followed old English examples; the governing body was a common council composed of the mayor, recorder, aldermen, and councillors. In most of the cities the councilmen and aldermen were "elected by popular vote under a franchise which everywhere included all of the well-to-do classes and generally a large proportion of the residents, though in no case was manhood suffrage established." In Philadelphia, Annapolis, and Norfolk the common council was a closed corporation; that is, the aldermen and councillors enjoyed life terms and the power of filling vacancies as they occurred. In accordance with English precedent, the mayor was not elected by popular vote. In a few instances he was selected by the common council, but in the majority of cities, including New York and Albany, he was appointed by the provincial governor. Somewhat restricted powers were at first conferred upon the municipality by its charter, and in the later period, before the Revolution, it was a common practice to secure from the colonial assemblies special acts granting additional powers. The striking feature of the colonial municipal system was the fusion of executive, legislative, and judicial functions in the hands of the same body; and it is interesting to note that the commission form of municipal government now being widely adopted throughout the United States is the return to the original principle in so

[1] Reference: Fairlie, *Municipal Administration*, pp. 72 ff.

far as it vests administrative and legislative powers in one authority.[1]

In the sphere of rural local government we have departed even less from colonial models than in other branches of administration. The Revolution did not disturb, in any fundamental manner, the institutions of local government which had come down from early colonial times; for, as Professor Fairlie says, "the main features of the old systems continued in the different states. Towns in New England and the middle states and parishes in the southern states remained unaltered; and are in fact not mentioned in most of the constitutions of the revolutionary period." [2] In New England the unit of local administration was the town, which was governed by a meeting of the electors, who chose the town officers, levied taxes, appropriated money, passed by-laws, and reviewed the activities of the various local officers.[3] Counties existed, of course, in New England, but only in a rudimentary form, and principally for judicial purposes. In the middle colonies, notably New York and Pennsylvania, there was a combination of town and county local government. Town meetings were held in New York as in New England. As early as 1691, however, a county board of supervisors, representing the various towns, was created and began to absorb at once the most important local administrative functions. In Pennsylvania, strong county administrative organization overshadowed the town and furnished the model for local government in a large number of western states. In the South, the plantation system led to the formation of scattered settlements, so that local government had to be based upon the county rather than the parish. Thus, for example, in Virginia, "the county became the unit of representation in the colonial assembly and the unit of military, judicial, highway, and fiscal administration. The officers were the county lieutenant, the sheriff (who acted as collector and treasurer), justices of the peace, and coroners. All were appointed

[1] Goodnow, *Municipal Government*, p. 176; *Readings*, p. 529. It should be noted that in New England the government of the urban centres was based upon the rural town-meeting system.

[2] *Local Government*, p. 33.

[3] For the minutes of a Boston town meeting in 1758, see *Readings*, p. 11, and compare with the documents on a modern New England town meeting, *Readings*, pp. 556 ff.

by the governor of the colony on the recommendation of the justices, and the latter thus became a self-perpetuating body of aristocratic planters controlling the whole county administration." [1]

Social Classes in Colonial Times [2]

In every colony there was a somewhat sharp differentiation of society into economic classes. In all of the colonies there was a distinct upper class: the clergy, professional men, merchants, and landed proprietors in New England; the landed proprietors and merchants in the middle colonies; and the great slave-holding planters in the South. At the bottom of the social scale there were the slaves and poor whites in the South, the mechanics, indented servants, and a few slaves in the middle colonies and New England. Between these social groups was a substantial middle class of small farmers, traders, and storekeepers.

The situation in New York can best be described in the language of Mr. Theodore Roosevelt: "The colony was in government an aristocratic republic, its constitution modelled on that of England and similar to it; the power lay in the hands of certain old and wealthy families, Dutch and English, and there was a limited freehold suffrage. The great landed families, the Livingstons, Van Rennselaers, Schuylers, Van Cortlandts, Phillipses, Morrises, with their huge manorial estates, their riches, their absolute social preëminence and their unquestioned political headship, formed a proud, polished, and powerful aristocracy, deep rooted in the soil. . . . They owned numerous black slaves, and lived in state and comfort on their broad acres, tenant-farmed, in the great roomy manor-houses, with wainscotted walls and huge fireplaces, and round about, the quaint old gardens, prim and formal with their box hedges and precise flower beds. . . .

"Next in importance to the great manorial lords came the rich merchants of New York; many families like the Livingstons, the most prominent of all, had representatives in both classes. . . . They were shrewd, daring, and prosperous; they were often their own ship-masters, and during the incessant

[1] Fairlie, *Local Government*, p. 19; for an illustrative document, see *Readings*, p. 13.

[2] Reference, Lodge: *English Colonies in America*

wars against the French and Spaniards went into privateering ventures with even more zest and spirit than into peaceful trading. Next came the smaller landed proprietors, who also possessed considerable local influence; such was the family of the Clintons. The law, too, was beginning to take high rank as an honorable and influential profession . . . The bulk of the people were small farmers in the country, tradesmen and mechanics in the towns. . . . The farmers were thrifty, set in their ways, and obstinate; the townsmen thrifty also, but restless and turbulent. Both farmers and townsmen were thoroughly independent and self-respecting, and were gradually getting more and more political power. . . . The habit of constantly importing indentured Irish servants, as well as German laborers, under contract, prevailed throughout the colonies and the number of men thus imported was quite sufficient to form a considerable element in the population, and to add a new, although perhaps not very valuable, strain to our already mixed blood. In taking up at random the file of the *New York Gazette* for 1766, we find among the advertisements many offering rewards for runaway servants; such as 'three pounds for the runaway servant Conner O'Rourke,' 'ten pounds for the runaway Irish servant, Philip Maginnis,' 'five pounds apiece for certain runaway German miners, — Bruderlein, Baum, Ostmann, etc. — imported under contract'; all this mixed in with advertisements of rewards of about the same money value for 'the mulatto man named Tom,' or the 'negroes Nero and Pompey.'"[1]

Political Theory[2]

There is no reason to suppose that the educated and well-to-do colonists were in any way discontented with the fundamental institutions of government under which they lived. At all events, we find no such literature of political criticism in the American colonies on the eve of the Revolution as we find in France previous to the meeting of the Estates General. It is true that in Pennsylvania some of the mechanics were discontented with the way in which the propertied classes conducted

[1] Theodore Roosevelt, *Gouverneur Morris* (American Statesmen Series), pp. 14 ff.

[2] Reference: Merriam, *American Political Theories; Readings*, p. 15.

the government of the city.[1] It is true, also, that there was some vague unrest among the disfranchised of New York City; but generally speaking there was no organized protest and no literature of protest.

Even the Puritan philosophy of New England got the name of being democratic because the Puritans had resisted royal prerogative rather than because they entertained any equalitarian notions of democracy. As early as 1631 the people of Massachusetts provided that no one should be admitted as a freeman unless he was a member of one of the churches, and to the very end a clear distinction was made between the inhabitants and the freemen enjoying political privileges. They regarded the Bible, interpreted by themselves, as the foundation of the state. "There is undoubtedly," said John Eliot, "a form of civil government instituted by God himself in the holy Scriptures, whereby any nation may enjoy all the ends and effects of government in the best manner, were they but persuaded to make a trial of it." There was in New England, especially in the rural districts, a considerable democratic equality, but nowhere in the literature of New England do we find any real enthusiasm for democracy in the abstract. In fact John Cotton in 1644 declared that democracy was "the meanest and worst of all forms of government."

In a treatise by John Wise, entitled, *A Vindication of the Government of New England Churches*, published in 1717, we find the following enumeration of the forms of government, with a commentary upon each of them:[2] "(1) a democracy, which is when the sovereign power is lodged in a council consisting of all the members, and where every member has the privilege of a vote. This form of government appears in the greatest part of the world, to have been the most ancient. For that reason seems to shew it to be most probable, that when men had thoughts of joyning in a civil body, would without question be inclined to administer their common affaires by their common judgement, and so must necessarily establish a democracy. A democracy is then erected, when a number of free persons, do assemble together, in order to enter into a covenant for uniting

[1] C. H. Lincoln, *The Revolutionary Movement in Pennsylvania*, 1760-76, University of Pennsylvania Publications.

[2] Extract slightly condensed.

themselves in a body. And to compleat this state these conditions are necessary: 1. That a certain time and place be assigned for assembling. 2. That the vote of the majority must pass for the vote of the whole body. 3. That magistrates be appointed to exercise the authority of the whole for the better dispatch of business, of everydays occurence. (2) The second species of regular government, is an aristocracy. (3) The third species of a regular government, is a monarchy. It is said of the British empire, that it has the main advantages of an aristocracy, and of a democracy, and yet free from the disadvantages and evils of either. It is such a Monarchy, as by most admirable temperament affords very much to the industry, liberty, and happiness of the subject, and reserves enough for the majesty and prerogative of any king, who will own his people as subjects, not as slaves. It is a kingdom, that of all kingdoms of the world, is most like to the kingdom of Jesus Christ, whose yoke is easy, and burden light."

Neither did the colonists entertain modern notions of religious liberty, although by gradual process a high degree of toleration had been established. In New York, for example, Catholics and Jews were excluded from the suffrage by the terms of the law, but it is impossible to discover to what extent the law was actually enforced. In fact, Catholics and Jews were quite frequently disfranchised. In Virginia the Established Church sought to suppress dissent, and as late as 1774 James Madison wrote: "that diabolical, hell-conceived principle of persecution rages among some. . . . There are at this time in the adjacent country no less than five or six well meaning men in close jail for publishing their religious sentiments which in the main are very orthodox." [1]

Experiments in Federation

Although it was the Revolution that welded the thirteen colonies into the union which finally proved permanent, there had been three noteworthy attempts at federation previous to the War of Independence. The first was the New England

[1] *Letters and Writings of James Madison*, Vol. I, p. 12. On the whole question of religious liberty, see S. H. Cobb, *The Rise of Religious Liberty in America*.

Confederation formed among Massachusetts Bay, Plymouth, Connecticut, and New Haven in 1643. The united colonies of New England were bound together in a "firm and perpetual league of friendship and amity for offence and defence, mutual advice and succor, upon all just occasions, both for preserving and propagating the truth and liberties of the Gospel and for their own mutual safety and welfare." For some twenty years the Confederation was active, and it continued to hold meetings until 1685, but it left little permanent impress.

The second attempt at union was at Albany in 1754, when on suggestion of the Lords of Trade in England an intercolonial conference was held for the purpose (among other things) of entering into "articles of Union and confederation with each other for mutual defence of his majesty's subjects and interests in North America in time of peace as well as war." Massachusetts, Connecticut, Rhode Island, Pennsylvania, New York, New Hampshire, and Maryland were represented, and a committee, with Franklin in the lead, reported plans for union. The colonists, however, did not adopt the scheme because they feared that it would give the crown too much power. The crown regarded the plan as too democratic, and so the project fell through.

The introduction of the Stamp Tax bill into Parliament led several of the colonies to protest to the home government; and when the bill was passed in spite of their objections, the Massachusetts legislature recommended a colonial congress and appointed representatives. After no little dispute among the members of other colonial assemblies, the proposed congress composed of the representatives of nine colonies — all except Virginia New Hampshire, Georgia, and North Carolina — convened in New York in 1765. Permanent union, however, was not their purpose. They merely formulated an address to the King, a memorial to the Lords, and a petition to Commons;[1] and the repeal of the Stamp Act put a stop to the union movement for the time. It required the patriotism and pressure of the long war to fuse the colonies into a nation.

[1] They also drafted a list of grievances.

CHAPTER II

INDEPENDENCE, UNION, AND SELF-GOVERNMENT

The American Revolution has two aspects. On the one hand, it was a contest between the government of Great Britain and those colonists who determined, in the beginning of the controversy, to resist the policy of the mother country, and finally to throw off her rule altogether. To bring this contest to a successful issue, the Revolutionists formed committees, assemblies, and national congresses; they raised troops, levied taxes, borrowed money, negotiated with foreign powers, and waged war in the field. On the other hand, when independence was declared, the Revolutionists had to provide some form of united government for the realization of their common purposes, and at the same time to establish permanent state governments. Thus coöperation among the Revolutionists of all the colonies and internal reconstruction within each colony proceeded simultaneously, and the result at the close of the war was a collection of "free, sovereign, and independent states" — each with a constitution of its own — leagued in a "perpetual union" under the Articles of Confederation.

Union under the Continental Congresses

The Revolution was the work of definite groups of men cooperating for specific purposes. In the preliminary stages of resistance to Great Britain, the colonists relied mainly on their regular assemblies as organs for the expression of revolutionary opinion, but as the contest became more heated and acts were performed for which there was no legal sanction, the Revolutionists began to form independent committees to represent them. This was necessary for the purposes of agitation, and later for organized rebellion, especially in those colonies with royal governors.

The germs of these revolutionary organizations which soon widened into state and national governments are to be found in the committees of correspondence — small groups of persons selected by the Revolutionists in parishes, towns, and counties for the purpose of corresponding with one another, comparing views, and finally coöperating in the great task of overturning the old government and setting up a new system. These committees began as local organizations, but spread so rapidly and coöperated so effectively that they soon gathered sufficient force to accomplish the work of the Revolution.[1]

As early as November, 1772, a committee of correspondence was formed in Boston under the direction of Samuel Adams;[2] it held regular meetings, sent emissaries to neighboring towns to organize similar bodies, and carried on a campaign of popular education in opposition to British colonial policy.

Early in the following year the Virginia House of Burgesses appointed a special committee which was charged "to obtain the most early and authentic intelligence of all such acts and resolutions of the British Parliament or proceedings of administration as may relate to or affect the British colonies in America; and to keep up and maintain a correspondence and communication with our sister colonies respecting those important considerations; and the result of such their proceedings from time to time to lay before this house." This official example was speedily followed by other legislative assemblies, so that within about a year there were twelve colonial committees appointed in regular form. Imposing as they seemed, however, they were by no means as active and important as the unofficial local committees representing the Revolutionists directly.

These local committees sprang up everywhere under the direction of the county committees, and assumed control of the revolutionary forces. Thus there was organized a government within a government, with the old territorial subdivisions of the colony as a basis. For example, in New Jersey each township had its committee which chose delegates to form the

[1] Collins, *Committees of Correspondence of the American Revolution*, Annual Report of the American Historical Association, 1901, Vol. I, pp. 247 ff.

[2] For the significant Boston resolution establishing this committee see *Readings*, p. 17.

county committee, which in its turn selected representatives to compose a committee for the entire colony. These committees were powerful organs for action; they kept up the general agitation; they called periodical conventions of Revolutionists; and indeed assumed the reins of government.

The skeleton or framework of the revolutionary machine was therefore well perfected when Samuel Adams in 1774 proposed in the Massachusetts legislature a resolution in favor of calling a congress of delegates from all the colonies to meet at Philadelphia in September.[1] While the messenger of the governor, sent to dissolve the assembly, was thundering at the door, the momentous resolve was passed and the call for united action against Great Britain was issued. The other colonies except Georgia responded to this appeal with alacrity by selecting, in some fashion or another, representatives for the general Congress. The method of choice varied so greatly that the Congress was in every way an irregular and revolutionary body. The colonies without the consent of the British crown can scarcely be said to have enjoyed the right of calling and organizing such a congress. In Massachusetts, Rhode Island, and Pennsylvania, the representatives were chosen informally by the colonial assembly; in New Hampshire they were selected by a meeting of delegates appointed by the several towns. In Connecticut they were elected by committees of correspondence; in New York practically by the Revolutionists of New York county; in New Jersey, Delaware, Maryland, and Virginia by conventions composed of county delegates, many of whom had been members of the colonial legislatures; in South Carolina by a "general meeting of the inhabitants of the colony," and in North Carolina by "a general meeting of the deputies of the province."[2] In all of these irregular elections, the lead was taken by the men who had been most active in the organization of committees of correspondence and the agitation against Great Britain.

The general purpose of this Congress, ostensibly at least, was stated in the instructions which were given to the delegation of each colony by the body that elected it. These instructions

[1] This call is printed in the *Readings*, p. 18.

[2] The South Carolina Resolution appointing delegates is in the *Readings*, p. 19.

did not speak of union or independence; perhaps it was not thought wise by the leaders to announce any distinctly revolutionary purpose, even if they entertained it. The Massachusetts instructions authorized the delegates to consult upon the state of the colonies, and to deliberate and determine upon wise and proper measures to be recommended for the recovery and establishment of their just rights and liberties and the restoration of harmony between Great Britain and the colonies. Indeed, most of the instructions indicated a desire to see good feeling restored; and those of South Carolina only authorized the delegates to take "legal" measures to obtain the repeal of the obnoxious laws. The tone of the colonists was determined, however, and North Carolina instructed her representatives to "take such measures as they may deem prudent to effect the purpose of describing American rights with certainty and guarding them from any future violation."

As the whole procedure, strictly speaking, could not have been regarded as legal at all, the limitations imposed on the delegates could not have had anything more than moral force. The bodies that chose them were not independent and sovereign states with law-making powers, but groups of discontented subjects of Great Britain seeking a redress of grievances. In accordance with the letter of the instructions, the Congress contented itself with remonstrating against British policy, recommending the colonists to join in the non-importation of British goods, and adopting other measures calculated to bring the British government to terms.

This boycott of British goods and the provisions for enforcing it had a marked effect on the course of events. It was agreed by the Congress that a committee should be chosen in every county, city, and town "by those who are qualified to vote for representatives in the legislature, whose business it shall be attentively to observe the conduct of all persons touching this association." These local committees were instructed to publish the names of all citizens who violated the terms of the boycott, to the end that all such foes to American rights might be publicly known and universally contemned. Thus a clear-cut test of allegiance to the revolutionary political system was provided, and tribunals competent to deal with refractory citizens were authorized to

apply the test.[1] The Revolutionists, consciously or not, were burning their bridges behind them.

The first Congress, furthermore, recommended the call of a second Congress for the purpose of continuing the work thus begun; and, acting on this suggestion, the revolutionary bodies in the colonies, organized in the form of the old assemblies, or conventions, or committees, selected the delegates to a new Congress. This time the instructions were a little more determined in tone, and there was less talk about reconciliation and legal measures. The Massachusetts and New York instructions spoke of the restoration of harmony, but likewise of the firm and secure establishment of American rights and privileges; New Hampshire gave "full and ample power in behalf of this province to consent and agree to all measures which shall be deemed necessary to obtain redress of American grievances"; and the Connecticut instructions authorized them "to join, consult, and advise with other delegates on proper measures for advancing the best good of the colonies."

When this second Congress met in Philadelphia on May 10, 1775, the cause of Revolution had advanced beyond the stage of mere negotiation. Within two months, Ethan Allen's troops took Fort Ticonderoga "in the name of the Great Jehovah and the Continental Congress," the battle of Bunker Hill was fought, and Washington was called to the command of the American troops. In the midst of the crisis, Congress seized and exercised sovereign powers; it assumed the direction of the war; entered into diplomatic negotiations with other countries; declared independence,[2] regulated common concerns; raised funds; and finally designed a firmer national union in the form of the Articles of Confederation. It was not an assembly of delegates formally chosen and instructed by legally constituted states; it was the central organ, not of colonies or of states, but of that portion of the American population that was committed to the cause of Revolution.

[1] On the political significance of the first Continental Congress, see C. L. Becker, *History of Political Parties in the Province of New York*, 1760–76, University of Wisconsin Publications, 1909.

[2] For the Declaration of Independence, see *Readings*, p. 21.

Union under the Articles of Confederation

The work of the second Congress had scarcely opened before the boldest of the leaders began to urge that independence was inevitable, and that it should be accompanied by confederation and negotiations with foreign powers.[1] As early as July 21, 1775, the Congress resolved itself into a committee of the whole to take into consideration the state of America, and Dr. Franklin submitted a draft of a plan for confederation. Under the stress of the conflict without, Congress was compelled to postpone the immediate discussion and completion of the union, and it was not until the summer of the following year, June 11, 1776, that a committee was appointed to prepare articles of confederation. The report of this committee made about one month later was then the subject of intermittent and lengthy debates.

The report of the committee to the effect that, in determining all questions, each colony should have one vote, gave rise to a spirited discussion. Dr. Franklin urged that if the smaller colonies gave equal money and men they should have equal votes, and advocated that votes should be in proportion to numbers. Franklin was supported by Dr. Rush, who represented the strong nationalist feeling, and made a national plea against the doctrine that the states were equal. "It will tend," he said, "to keep up colonial distinctions. We are now a new nation. Our trade, language, customs, manners don't differ more than they do in Great Britain. The more a man aims at serving America, the more he serves his colony. It will promote factions in Congress and in the States; it will prevent the growth of freedom in America; we shall be loth to admit new colonies into the confederation. If we vote by numbers, liberty will be always safe. . . . We are dependent on each other, not totally independent States. . . . When I entered that door, I considered myself a citizen of America.'[2]

The view of Franklin and Rush was not shared by the majority of the Congress, however. Mr. Sherman urged that they were representatives of states, not of individuals, though he was willing to see devised a system by which the states and

[1] John Adams, *Works*, Vol. II, pp. 503–510.
[2] *Ibid.*, pp. 496 ff.

individuals should both be represented. The Congress at last decided that each state retained "its sovereignty, freedom, and independence, and every power, jurisdiction, and right" not expressly granted to the United States in Congress assembled, and provided that in Congress each state, regardless of its area, population, and wealth, should have one vote.

Other questions, notably taxation,[1] were thoroughly considered and the final draft approved in November, 1777. On the day that the agreement was reached, the Articles, accompanied by a long and eloquent letter urging ratification, were submitted to the legislatures of the states. The framers pointed out the difficulty involved in the formation of a permanent union accommodated to the opinions and wishes of the delegates of so many states differing in habits, produce, commerce, and internal police; and recommended that the state legislatures review their work "under a sense of the difficulty of combining in one general system the various sentiments and interests of a continent divided into so many sovereign and independent communities, under a conviction of the absolute necessity of uniting all our councils and all our strength to maintain and defend our common liberties." [2]

Notwithstanding the discouragements of the war then in progress and the imperative need for a closer coöperation to secure the independence declared in 1776, the states were slow in ratifying the Articles. It is true, eleven states accepted the plan of union within a year, but of these New York added a proviso that its acceptance should not be binding until the others had agreed, and some proposed alterations in the draft submitted. It was not until the opening of 1781 that Maryland, which had so long abstained from ratification on account of the western land question, finally accepted the Articles of Confederation. At noon on March 1 of that year the roar of cannon from the ships of war in the Delaware announced to the world that the Union "begun by necessity" had been "indissolubly cemented."

The government provided by the Articles of Confederation, as we shall see, became more famous for its weakness and short-

[1] Jefferson, *Works* (Ford Ed.), Vol. I, pp. 38 ff.
[2] *Secret Journals of Congress*, Vol. I, pp. 362 ff.

comings than for its positive achievements.[1] The management of the general interests of the United States was vested under the Articles in a Congress composed of not less than two nor more than seven delegates from each state, appointed as the state legislatures should direct, serving subject to recall at any time, and meeting annually. In this Congress, each state was given one vote and had to assume the expense of maintaining its delegates. No president or permanent executive was provided, but Congress was authorized to appoint a committee to serve during its recesses and discharge such duties as might be intrusted to it. No confederate court was erected, but Congress was authorized to act as a court of appeal in cases of disputes between states, or provide for the creation of a special committee to try such causes on request. With this government, limited in its taxing and commercial powers, the states attempted to conduct their common business for a period of eight years with results that made inevitable a constitutional revolution.[2]

Formation of State Governments

During the revolutionary conflict the colonial governments, regularly established under the authority of the British crown, broke down or passed into the possession of the popular party. From the royal province, the governor fled before the uprising of the people, and with his departure the executive and judicial branches in their higher ranges went to pieces. The New Hampshire constitution of 1776, for example, complained of "the sudden and abrupt departure of his Excellency John Wentworth, Esq., our late governor, and several of the council, leaving us destitute of legislation and no executive courts being open to punish criminal offenders; whereby the lives and property of the honest people of this colony are liable to the machinations and evil designs of wicked men." The New Hampshire assembly or lower house thereupon called a new congress, which was duly elected and assumed the powers of the government which had been thus abandoned. In Massachusetts, the royal governor summarily dissolved the assembly, and finding a new election, in September, 1774, resulting in the return of even

[1] See *Readings*, pp. 25–34, for the Articles of Confederation.
[2] See *Readings*, p. 38, and below, chap. iii.

more contentious representatives, he annulled the writs of election; but in vain, for the men thus chosen met in spite of the governor's orders and assumed full authority of government in the commonwealth. In Connecticut and Rhode Island, where there were no royal governors to dissolve the assemblies, and in the proprietary colonies of Pennsylvania and Delaware, where such authority was not exercised by the governor, the assemblies, purged of the loyalist element, took charge of directing the work of the Revolution. As a Pennsylvania Revolutionist wrote in 1775, "we must esteem it a particular happiness that we have a House of Assembly which from our constitution cannot be dissolved and which coincides with the [continental] Congress in the opposition to an arbitrary court." [1] Whatever the form, each colony during the Revolution had a legislature, congress, or convention chosen in some fashion by the supporters of the American cause. Sometimes the assembly was elected by popular vote, royalists being excluded; sometimes the members were chosen by local meetings of Revolutionists; and sometimes by town authorities. These provisional assemblies seized on all the powers of government in their respective jurisdictions, made laws, levied taxes, raised troops, and directed the Revolution.

For a few months at the opening of the contest with the mother country, while the future was uncertain and return to the old allegiance was not impossible, the colonists were at a loss to determine on just the form of government required by the situation. Under these circumstances, the provincial convention of Massachusetts, then serving as the provisional government of that colony, applied to the Congress at Philadelphia in May, 1775, for explicit instructions concerning the organization of a more regular government. To this request, Congress replied advising the convention that it was not bound by the late act of Parliament altering the charter of Massachusetts, and requesting it to ask the towns entitled to representation to choose their regular delegates to a new assembly which should act as the government until a royal governor could be secured who would obey the terms of the charter. The convention complied with this advice, and thus instituted a government

[1] Force, *American Archives*, Fourth Series, Vol. III, p. 1410.

which remained in power until 1780, when the state constitution was put into force.

The action of Massachusetts was followed in the autumn of that year (1775) by applications from New Hampshire, Virginia, and South Carolina for instructions, to which the Congress replied advising them to "call a full and free representation of the people, in order to form such a form of government as, in their judgment, would best promote the happiness of the people and most effectually secure peace and good order in their provinces during the continuance of the dispute with Great Britain."

In response to this advice, the temporary provincial convention in New Hampshire ordered a general election of delegates to a new convention empowered to assume the government under the direction of Congress for one year, and this new convention, as soon as it met, drew up a form of government to "continue during the present unhappy and unnatural contest with Great Britain." Declaring that they would rejoice in reconciliation with the mother country, they nevertheless committed themselves to the care of the Continental Congress in whose wisdom and prudence they confided. This brief and fragmentary instrument, drawn up by men who could not foretell the outcome of the conflict then raging around them, remained the constitution of New Hampshire until after the establishment of peace, when it was replaced by the new and more elaborate instrument of 1784. South Carolina likewise followed the suggestion of Congress and drew up, in March, 1776, a constitution designed to serve until "an accommodation of the unhappy differences between Great Britain and America" could be obtained. Neither of these instruments was submitted for popular ratification, and neither was a state constitution, properly speaking, for both contemplated a possible return to the former allegiance.

At length, in May, 1776, about two months before the formal Declaration of Independence, Congress, aware that such a step was inevitable, issued a general recommendation "to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs has been hitherto established, to adopt such government as shall in the opinion of the representatives of the people best conduce to the happiness and safety of their constituents in particular

and America in general." [1] This recommendation met with general approval among the Revolutionists, and before the expiration of a year Virginia, New Jersey, Pennsylvania, Delaware, Maryland, Georgia, and New York had drafted new instruments of government as states, not as colonies uncertain of their destiny. Though Virginia and New Jersey completed their constitutions before the Fourth of July, they declared the dominion of Great Britain at an end. Virginia simply repudiated the authority of George III, and New Jersey expressly said in the written instrument that "all civil authority under him is necessarily at an end." Connecticut and Rhode Island, deeming the government they possessed under their ancient charters sufficient for their needs, drew up no new instruments, but merely renounced their allegiance to George III and continued their old systems without any structural change. South Carolina, in view of the temporary character of the document drafted in 1776, drew up a new and more complete constitution in 1778, and Massachusetts, with more deliberation, put into effect in 1780 a constitution which in its fundamental principles remains unchanged to-day — the original instrument having never been reorganized. Thus the transition from colonies to states was completed, but in no instance was the issue submitted to popular approval at the polls.

So irregular were the methods pursued by the Revolutionists of the various states in drawing up their constitutions that it is well-nigh impossible to make any general statement true of all of them, except that Delaware and Massachusetts were the only states that had their constitutions framed by regularly organized conventions summoned for that special purpose and confining their activities to the single function of framing an instrument of government. In all of the other colonies, the bodies that drafted the constitutions were primarily engaged in the maintenance of orderly government during the crisis and in meeting the demands which fell upon them through the exigencies of war.

The procedure, however, may be illustrated by the events in Pennsylvania. There the "Committee of the City and Liberties of Philadelphia," a revolutionary and voluntary body, in pur-

[1] *Readings*, p. 35.

pursuance of the advice of Congress given in May, 1776, despatched to the county committees circular letters asking the appointment of delegates to a provincial conference. In response to this call, the convention, composed of ninety-seven members, assembled in the city of Philadelphia on June 18, and after due deliberation decided that a special convention should be called for the purpose of drafting the constitution, and that it should be composed of eight representatives from the city of Philadelphia and each of the counties.

In spite of their declaration that all authority came from the people, the preliminary conference at Philadelphia had no intention of admitting all of the people to a vote in the election of the delegates to the coming constitutional convention. On the contrary they expressly excluded such as were not county or provincial tax-payers, those who would not take an oath to support the Revolutionary cause, and those who had been published by the committee of public safety as enemies to the liberties of America. What proportion of the adult males the voters, under these strict limitations, actually composed, it is impossible to determine, but it is safe to assume that the work of transforming the colony into a state was accomplished by an energetic minority. Moreover, the constitution which the new convention completed in September, 1776, was not submitted to the people for popular ratification.

A somewhat similar process was followed in Maryland,[1] where the provisional revolutionary congress, on receipt of the instructions of Congress, resolved that "A new convention be elected for the express purpose of forming a new government by the authority of the people only and enacting and ordering all things for the preservation, safety, and general welfare of this colony." The call for the election of the new convention, in addition to excluding the "enemies of the liberties of America," placed restrictions on the suffrage as follows: "All freemen above twenty-one years of age, being freeholders of not less than fifty acres of land or having visible property in this colony to the value of £40 sterling at least, and no others be admitted to vote for representatives to serve in the said convention for the said counties and districts, and the town of Baltimore aforesaid;

[1] See *Readings*, p. 36.

and that all freemen above twenty-one years of age, owning a whole lot of land in the said city of Annapolis, or having a visible estate of £20 sterling at the least within this province or having served five years to any trade within the said city and being a housekeeper, and no others be admitted to vote for representatives to serve in the said convention for the said city." The constitution drafted by the convention elected by these voters was not submitted for ratification on its completion in November, 1776.

Thus America came out of the Revolution a union of thirteen states, loosely bound together under the Articles of Confederation. Each state, except Rhode Island and Connecticut which continued their colonial charters, had a new written constitution based for practical purposes upon the precedents which had been established during colonial times. Seven years of war and the overthrow of British dominion had left the social order essentially unchanged.

CHAPTER III

THE ESTABLISHMENT OF THE FEDERAL CONSTITUTION

QUITE naturally the men who led in stirring up the revolt against Great Britain and in keeping the fighting temper of the Revolutionists at the proper heat were the boldest and most radical thinkers — men like Samuel Adams, Thomas Paine, Patrick Henry, and Thomas Jefferson. They were not, generally speaking, men of large property interests or of much practical business experience. In a time of disorder, they could consistently lay more stress upon personal liberty than upon social control; and they pushed to the extreme limits those doctrines of individual rights which had been evolved in England during the struggles of the small landed proprietors and commercial classes against royal prerogative, and which corresponded to the economic conditions prevailing in America at the close of the eighteenth century. They associated strong government with monarchy, and came to believe that the best political system was one which governed least. A majority of the radicals viewed all government, especially if highly centralized, as a species of evil, tolerable only because necessary and always to be kept down to an irreducible minimum by a jealous vigilance. Jefferson put the doctrine in concrete form when he declared that he preferred newspapers without government to government without newspapers. The Declaration of Independence, the first state constitutions, and the Articles of Confederation bore the impress of this philosophy. In their anxiety to defend the individual against government interference and to preserve to the states a large sphere of local autonomy, these Revolutionists had set up a system too weak to achieve even the primary objects of government; namely, national defence, the protection of property, and the advancement of commerce. They were not unaware of the character of their handiwork, but many believed with Jefferson that "man was a rational animal endowed by nature with rights and with an innate sense of justice and that he could

be restrained from wrong and protected in right by moderate powers confided to persons of his own choice."[1] Occasional riots and disorders, they held, were preferable to too much government.

The new American political system based on these doctrines had scarcely gone into effect before it began to incur opposition from many sources. The close of the Revolutionary struggle removed the prime cause for radical agitation and brought a new group of thinkers into prominence. When independence had been gained, the practical work to be done was the maintenance of social order, the payment of the public debt, the provision of a sound financial system, and the establishment of conditions favorable to the development of the economic resources of the new country. The men who were principally concerned in this work of peaceful enterprise were not the philosophers, but men of business and property and the holders of public securities — "a strong and intelligent class possessed of unity and informed by a conscious solidarity of interests."[2] For the most part they had had no quarrel with the system of class rule and the strong centralization of government which existed in England. It was on the question of policy, not of governmental structure, that they had broken with the British authorities. By no means all of them, in fact, had even resisted the policy of the mother country, for within the ranks of the conservatives were large numbers of Loyalists who had remained in America, and, as was to have been expected, cherished a bitter feeling against the Revolutionists, especially the radical section which had been boldest in denouncing the English system root and branch. In other words, after the heat and excitement of the War of Independence were over and the new government, state and national, was tested by the ordinary experiences of traders, financiers, and manufacturers, it was found inadequate, and these groups accordingly grew more and more determined to reconstruct the political system in such a fashion as to make it subserve their permanent interests.

[1] *Readings*, p. 93. [2] Wilson, *Division and Reunion*, p. 12.

Reasons for the Failure of the Articles of Confederation [1]

To understand the seriousness of the situation for this influential portion of the population, it is necessary to examine somewhat closely the precise ways in which the confederate system failed to afford adequate guarantees to property and commerce.

1. The most obvious defect of the government under the Articles was its inability to pay even the interest on the public debt, most of which had been incurred in support of the war. In spite of the most heroic efforts, the arrears on that portion of the debt held by American citizens increased within five years (1784–89) from $3,109,000 to $11,493,858; and at the same time the arrears on the foreign debt multiplied about twenty-five fold. In short, a large group of public creditors were failing to receive the interest due them on government securities. It would have been exercising almost superhuman faculties for them to have quietly acquiesced in the indefinite continuance of such a government and such a policy.

Indeed, the system of raising money provided by the Articles of Confederation was so constructed as to give them no hope that, during its continuance, the long-delayed payments could ever be effected. The confederate Congress had no immediate taxing power: all charges of war and all other expenses were to be defrayed out of a common treasury supplied through levies made by the legislatures of the several states in proportion to the value of the land within each state. Limited to one form of taxation [2] — direct taxation by quotas at that — and dependent upon the will of the state legislatures for all payments, the confederate Congress really could do nothing but recommend contributions, and was in fact compelled to beg from door to door only to meet continued rebuffs, and to sink deeper and deeper in debt from year to year.

Not only was the Congress thus limited in its resources to quotas imposed on the states; the very principle of apportionment according to the value of lands, buildings, and improve-

[1] For Madison's concise summary, see *Readings*, p. 38.

[2] Congress determined the amount to be raised, and each levy was to be supplied by the several states in proportion to the value of their lands and improvements. For the movement for the Constitution, see Beard, *An Economic Interpretation of the Constitution of the United States*.

ments was itself unjust as measured by the prevailing doctrines of taxation. "The wealth of nations," it was urged in *The Federalist*, "depends upon an infinite variety of causes. . . . There can be no common measure of national wealth, and, of course, no general or stationary rule by which the ability of a state to pay taxes can be determined. The attempt, therefore, to regulate the contributions of the members of the confederacy by any such rule cannot fail to be productive of glaring inequality and extreme oppression. This inequality would of itself be sufficient in America to work the eventual destruction of the Union, if any mode of enforcing compliance with its requisitions could be devised." [1]

This objection that the system of taxation was unjust only added a welcome sanction to the natural dislike of states to pay direct contributions in a lump sum to a distant central government — a dislike which Bismarck discovered long afterward in his experience with the matricular contributions in the German Empire. Consequently the states of the Union vied with each other in delaying the payments of their quotas into the common treasury. As the modern holder of personal property pleads the evasions of others as a justification for not paying taxes on the full valuation of his own property, so each backward state pleaded the delays of other states, and hesitated to pay even when it could, on the ground that it might contribute more than its share. During a period of about four years, from November 11, 1781, to January 1, 1786, Congress laid on the states more than $10,000,000 in requisitions, and received in payment less than one-fourth of the amount demanded. During the fourteen months preceding the formation of the new federal Constitution less than half a million was paid into the confederate treasury — not enough to pay the interest on the foreign debt alone. Had it not been for the loans which the bankers of Holland were willing to make to the struggling republic, the confederacy would surely have been confronted by bankruptcy and total ruin before relief came.

2. The dissatisfaction of the financial interests was more than equalled by the dissatisfaction of traders and manufacturers, both in America and Europe, with the unbusiness-like character

[1] *The Federalist*, No. XXI.

of the confederate Congress. It is true that the Congress could regulate foreign commerce by making treaties with foreign powers and that the states were forbidden to lay any imposts or duties which might interfere with certain of these agreements, but in practice the confederate government was unable to enforce treaty stipulations on the unwilling states that insisted on regulating commerce in their own way. The states bid against one another for trade; they laid duties on goods passing through their limits, thus stirring up strife among themselves; and, what was no less disastrous, they lost the advantages which a reasonable degree of coöperation would have gained.[1]

The disordered state of American commerce under the Articles of Confederation can best be described in the felicitous language of John Fiske: "The different states, with their different tariff and tonnage acts, began to make commercial war upon one another. No sooner had the other three New England states virtually closed their ports to British shipping than Connecticut threw hers wide open, an act which she followed up by laying duties upon imports from Massachusetts. Pennsylvania discriminated against Delaware, and New Jersey, pillaged at once by both her greater neighbors, was compared to a cask tapped at both ends. The conduct of New York became especially selfish and blameworthy. . . . Of all the thirteen states, none behaved worse except Rhode Island.

"A single instance, which occurred early in 1787, may serve as an illustration. The city of New York had long been supplied with firewood from Connecticut, and with butter and cheese, chickens and garden vegetables, from the thrifty farms of New Jersey. This trade, it was observed, carried thousands of dollars out of the city and into the pockets of detested Yankees and despised Jerseymen. It was ruinous to domestic industry, said the men of New York. . . . Acts were accordingly passed,

[1] "No nation acquainted with the nature of our political system," declared Hamilton in No. XXII of *The Federalist*, "would be unwise enough to enter into stipulations with the United States, conceding on their part privileges of importance, while they were apprised that engagements on the part of the union might at any moment be violated by its members; and while they found from experience that they might enjoy every advantage they desired in our markets without granting us any in return, but such as momentary convenience might suggest."

obliging every Yankee sloop which came down through Hell Gate, and every Jersey market boat which was rowed across from Paulus Hook to Cortlandt Street, to pay entrance fees and obtain clearances at the custom-house, just as was done by ships from London or Hamburg; and not a cartload of Connecticut firewood could be delivered at the back door of a country house in Beekman Street until it should have paid a heavy duty. . . . The New Jersey legislature made up its mind to retaliate. The city of New York had lately bought a small patch of ground on Sandy Hook, and had built a lighthouse there. . . . New Jersey gave vent to her indignation by laying a tax of $1800 a year on it. Connecticut was equally prompt. At a great meeting of business men, held at New London, it was unanimously agreed to suspend all commercial intercourse with New York. Every merchant signed an agreement, under penalty of $250 for the first offence, not to send any goods whatever into the hated state for a period of twelve months." [1]

3. The monetary system under the Articles of Confederation was even in worse confusion, if possible, than commerce. During the Revolution, Congress had created an enormous amount of paper money which so speedily declined in value that in 1780 one paper dollar was worth less than two cents in specie. It took eleven dollars of this money to buy a pound of brown sugar in Virginia; seventy-five dollars for a yard of linen; and one hundred dollars for a pound of tea. Jefferson records that he paid his physician $3000 for two calls in 1781, and gave $355.50 for three quarts of brandy. After the Revolution, the great majority of states continued to issue paper money without any currency basis. In Rhode Island a most extraordinary conflict occurred over the control of the monetary system. The farmers, being in a majority, secured the passage of a law authorizing the issuance of money to themselves on the basis of mortgages against their farms. The merchants refused to accept this paper, and it promptly declined to about one-sixth of its nominal value. Heavy penalties then were placed upon those who would not accept it, but without avail. Merchants closed their shops rather than yield, and farmers refused to bring produce to town in the hope of starving the merchants out. In nearly every

[1] J. Fiske, *The Critical Period of American History*, pp. 144–147.

state determined efforts were made to force creditors to accept depreciated paper in payment of lawful debts. It is small wonder, therefore, that the framers of the federal Constitution inserted clauses in that instrument forbidding states to emit bills of credit, make anything but gold and silver coin a legal tender in payment of debts, or pass any law impairing the obligation of contracts. It is small wonder also that merchants and creditors everywhere welcomed this measure of relief when the new Constitution was laid before them for ratification.

4. Shays' rebellion in Massachusetts showed that grave dangers to public order might arise in any state and that the duly constituted authorities might be overthrown by violence if no assistance could be secured from neighboring states or the federal authority. The heavy public debt in Massachusetts had necessitated heavy taxes, and the attempt of creditors to recover debts due them added to popular discontent. "A levelling, licentious spirit," says Mr. Curtis, "a restless desire for change, and a disposition to throw down the barriers of private rights, at length broke forth in conventions, which first voted themselves to be the people and then declared their proceedings to be constitutional. At these assemblies the doctrine was publicly broached that property ought to be common, because all had aided in saving it from confiscation by the power of England. Taxes were voted to be unnecessary burdens, the courts of justice to be intolerable grievances, and the legal profession a nuisance. A revision of the [state] constitution was demanded, in order to abolish the Senate, reform the representation of the people, and make all the civil officers eligible by the people. . . . Had the government of the state been in the hands of a person less firm and less careless of popularity than Bowdoin it would have been given up to anarchy and civil confusion." [1]

5. The impotence which characterized the confederate government in enforcing measures of taxation and commercial treaties against recalcitrant states extended throughout the whole domain of its nominal authority. It was dependent almost wholly upon the states for the enforcement of its laws, and yet it had no express power to exact obedience from them or to punish them by pecuniary penalties or suspension of privileges. Who-

[1] *Constitutional History of the United States*, Vol. I, p. 181.

ever argued that such a right was necessarily inherent in every government was met by the contention that the Articles themselves provided "that each state retained every power, jurisdiction, and right not expressly delegated to the United States in Congress assembled." Indeed, as Madison afterwards pointed out in the convention at Philadelphia, "the use of force against a state would look more like a declaration of war than an infliction of punishment and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound." [1] Thus was afforded "the extraordinary spectacle of a government destitute even of a shadow of a constitutional power to enforce the execution of its own laws." [2]

6. This reduction of the confederate government's power to a shadow was the logical result of what Hamilton regarded as the great and radical vice of the Articles of Confederation; namely, the principle of legislation for states in their collective or corporate capacity as distinguished from the individuals of which they were composed.[3] Subject to the rule of apportionment, Congress could demand an unlimited supply of money and men from the states, but in both these important matters, upon which, in final analysis, the foundations of all government rest, Congress could bring no pressure to bear upon any individual. It was practically restricted to transactions with states — corporate entities — represented by transient and often hostile legislatures, so that the complete enforcement of any measure of taxation required the concurrence of thirteen different bodies — a conjuncture which was well-nigh impossible to secure in practice. For the purpose of safeguarding and advancing the interests of a nation with such vast natural resources at its command, a more inadequate instrument could scarcely be imagined; and the gravity of the situation was all the more serious because the Articles required the consent of every state to the slightest amendment. It was not merely the Confederation that failed — the entire system, state and national, did not correspond to the real and permanent interests of that portion of the population who by reason of their property and intelligence possessed both the will and the capacity for concerted action on a scale large enough

[1] Elliot's *Debates*, Vol. V, p. 140. [2] *The Federalist*, No. XXI.
[3] *Ibid.*, No. XV.

to overthrow the confederate government and set up an adequate system of union in its stead.

The Movement for Constitutional Revision

The Congress of the Confederation was not long in discovering the true character of the futile authority which the Articles had conferred upon it. The necessity for new sources of revenue became apparent even while the struggle for independence was yet undecided, and, in 1781, Congress carried a resolution to the effect that it should be authorized to lay a duty of five per cent on certain goods. This moderate proposition was defeated because Rhode Island rejected it on the grounds that "she regarded it the most precious jewel of sovereignty that no state shall be called upon to open its purse but by the authority of the state and by her own officers." Two years later Congress prepared another amendment to the Articles providing for certain import duties, the receipts from which, collected by state officers, were to be applied to the payment of the public debt; but three years after the introduction of the measure, four states, including New York, still held out against its ratification, and the project was allowed to drop. At last, in 1786, Congress in a resolution declared that the requisitions for the last eight years had been so irregular in their operation, so uncertain in their collection, and so evidently unproductive, that a reliance on them in the future would be no less dishonorable to the understandings of those who entertained it than it would be dangerous to the welfare and peace of the Union. Congress, thereupon, solemnly added that it had become its duty "to declare most explicitly that the crisis had arrived when the people of the United States, by whose will and for whose benefit the federal government was instituted, must decide whether they will support their rank as a nation by maintaining the public faith at home and abroad, or whether for the want of a timely exertion in establishing a general revenue and thereby giving strength to the Confederacy, they will hazard not only the existence of the Union but of those great and invaluable privileges for which they have so arduously and so honorably contended."

In fact, the Articles of Confederation had hardly gone into effect before the leading citizens also began to feel that the powers

of Congress were wholly inadequate. In 1780, even before their adoption, Alexander Hamilton proposed a general convention to frame a new constitution, and from that time forward he labored with remarkable zeal and wisdom to extend and popularize the idea of a strong national government. Two years later, the assembly of the state of New York recommended a convention to revise the Articles and increase the power of Congress. In 1783, Washington, in a circular letter to the governors,[1] urged that it was indispensable to the happiness of the individual states that there should be lodged somewhere a supreme power to regulate and govern the general concerns of the confederation. Shortly afterward (1785), Governor Bowdoin, of Massachusetts, suggested to his state legislature the advisability of calling a national assembly to settle upon and define the powers of Congress; and the legislature resolved that the government under the Articles of Confederation was inefficient and should be reformed; but the resolution was never laid before Congress.

In the same year, however, that the Massachusetts resolution was passed, commissioners, selected by Maryland and Virginia for the purpose of reaching an agreement respecting the navigation of the Potomac, recommended the appointment of a new commission with power to arrange a tariff schedule, subject to the consent of Congress, to be enforced by both states. Thereupon, Virginia invited all the other states to send delegates to a convention at Annapolis to consider the question of duties on imports and commerce in general. When this convention assembled in 1786, delegates from only five states were present, and they were disheartened at the limitations on their powers and the lack of interest the other states had shown in the project. With remarkable foresight, however, Alexander Hamilton seized the occasion to secure the adoption of a recommendation advising the states to choose representatives for another convention to meet in Philadelphia the following year "to consider the Articles of Confederation and to propose such changes therein as might render them adequate to the exigencies of the union." This recommendation was cautiously worded, for Hamilton did not

[1] This letter is printed along with other important materials bearing on the movement for the Constitution in Professor Lawrence Evans' *Writings of Washington* (1908).

want to raise any unnecessary alarm. Accordingly no general reconstruction of the political system was suggested; the Articles of Confederation were merely to be "revised"; and the amendments were to be approved by the state legislatures as provided by that instrument.

The proposal of the Annapolis convention was transmitted to the state legislatures and laid before Congress. Congress thereupon resolved in February, 1787, that a convention should be held for the sole and express purpose of revising the Articles of Confederation and reporting to itself and the legislatures of the several states such alterations and provisions as would when agreed to by Congress and confirmed by the states render the federal constitution adequate to the exigencies of government and the preservation of the Union.[1]

In pursuance of this call, delegates to the new convention were chosen by the legislatures of the states or by the governors in conformity to authority conferred by the legislative assemblies.[2] The delegates were given instructions of a general nature by their respective states, none of which, apparently, contemplated any very far-reaching changes. In fact, almost all of them expressly limited their representatives to a mere revision of the Articles of Confederation.[3] For example, Connecticut authorized her delegates to represent and confer for the purpose mentioned in the resolution of Congress and to discuss such measures "agreeably to the general principles of republican government" as they should think proper to render the Union adequate. Delaware, however, went so far as to provide that none of the proposed alterations should extend to the fifth part of the Articles of Confederation guaranteeing that each state should be entitled to one vote.

The National Constitutional Convention of 1787

It was a truly remarkable assembly of men that gathered in Philadelphia in May, 1787, to undertake the work of reconstructing the American system of government. It is not merely

[1] For this call, see *Readings*, p. 43.

[2] Rhode Island alone was unrepresented. In all, sixty-two delegates were appointed by the states; fifty-five of these attended sometime during the sessions; but only thirty-nine signed the finished document.

[3] For example, see the New York instructions, *Readings*, p. 44.

patriotic pride that compels one to assert that never in the history of assemblies has there been a convention of men richer in political experience and in practical knowledge, or endowed with a profounder insight into the springs of human action and the intimate essence of government. It is indeed an astounding fact that at one time so many men skilled in statecraft could be found on the very frontiers of civilization among a population numbering about four million whites. It is no less a cause for admiration that their instrument of government should have survived the trials and crises of a century that saw the wreck of more than a score of paper constitutions. On the memorable roll of that convention were Elbridge Gerry, Rufus King, Roger Sherman, Alexander Hamilton, Oliver Ellsworth, Benjamin Franklin, Robert Morris, Gouverneur Morris, William Paterson, James Wilson, George Washington, Edmund Randolph, James Madison, John Rutledge, and the two Pinckneys — to mention only a few whose names have passed indelibly into the records of American history.

All the members had had a practical training in politics. Washington, as commander-in-chief of the revolutionary forces, had learned well the lessons and problems of war, and mastered successfully the no less difficult problems of administration. The two Morrises had distinguished themselves in grappling with financial questions as trying and perplexing as any which statesmen had ever been compelled to face. Seven of the delegates had gained political wisdom as governors of their native states; and no less than twenty-eight had served in Congress either during the Revolution or under the Articles of Confederation. There were men trained in the law, versed in finance, skilled in administration, and learned in the political philosophy of their own and all earlier times. Moreover, they were men destined to continue public service under the government which they had met to construct — Presidents, Vice-Presidents, heads of departments, justices of the Supreme Court, were in that imposing body. They were equal to the great task of constructing a national system strong enough to defend the country on land and sea, pay every dollar of the lawful debt, and afford sufficient guarantees to the rights of private property.

The criticism has been advanced that this assembly of great men was more interested in strong government than in democ-

racy. It must be remembered, however, that they were convened not to write a Declaration of Independence, but to frame a government which would meet the practical issues that had arisen under the Articles of Confederation. The objections they entertained to direct popular government, and they were undoubtedly many, were based upon their experience with popular assemblies during the immediately preceding years. With many of the plain lessons of history before them, they naturally feared that the rights and privileges of the minority would be insecure if the principle of majority rule was definitely adopted and provisions made for its exercise. Furthermore, it will be remembered that up to that time the right of all men, as men, to share in the government had never been recognized in practice. Everywhere in Europe the government was in the hands of a ruling monarch or at best a ruling class; everywhere the mass of the people had been regarded principally as an arms-bearing and tax-paying multitude, uneducated, and with little hope or capacity for advancement. Two years were to elapse after the meeting of the grave assembly at Philadelphia before the transformation of the Estates General into the National Convention in France opened the floodgates of revolutionary ideas on human rights before whose rising tide old landmarks of government are still being submerged. It is small wonder, therefore, that under the circumstances many of the members of that august body held popular government in slight esteem and took the people into slight consideration — enough "to inspire them with the necessary confidence," as Mr. Gerry frankly put it.[1]

Indeed, every page of the laconic record of the proceedings of the convention preserved to posterity by Mr. Madison shows conclusively that the members of that assembly were not seeking to realize any fine notions about democracy and equality, but were striving with all the resources of political wisdom at their command to set up a system of government that would be stable and efficient, safeguarded on one hand against the possibilities of despotism and on the other against the onslaught of majorities. In the mind of Mr. Gerry, the evils they had experienced flowed "from the excess of democracy," and he confessed that while he was still republican, he "had been taught by experience the danger of the levelling spirit."[2] Mr. Ran-

[1] Elliot's *Debates*, Vol. V, p. 160. [2] *Ibid.*, Vol. V, p. 136.

dolph, in offering to the consideration of the convention his plan of government, observed "that the general object was to provide a cure for the evils under which the United States labored; that, in tracing these evils to their origin, every man had found it in the turbulence and follies of democracy; that some check therefore was to be sought for against this tendency of our governments; and that a good Senate seemed most likely to answer the purpose." [1] Mr. Hamilton, in advocating a life term for Senators, urged that "all communities divide themselves into the few and the many. The first are rich and well born and the other the mass of the people who seldom judge or determine right." [2]

Gouverneur Morris wanted to check the "precipitancy, changeableness, and excess" of the representatives of the people by the ability and virtue of men "of great and established property — aristocracy; men who from pride will support consistency and permanency. . . . Such an aristocratic body will keep down the turbulence of democracy." While these extreme doctrines were somewhat counterbalanced by the democratic principles of Mr. Wilson, who urged that "the government ought to possess, not only first, the force, but second the mind or sense of the people at large," Madison doubtless summed up in a brief sentence the general opinion of the convention when he said that to secure private rights against majority factions, and at the same time to preserve the spirit and form of popular government, was the great object to which their inquiries had been directed.[3]

They were anxious above everything else to safeguard the rights of private property against any levelling tendencies on the part of the propertyless masses. Gouverneur Morris, in speaking on the problem of apportioning representatives, correctly stated the sound historical fact when he declared: "Life and liberty were generally said to be of more value than property. An accurate view of the matter would, nevertheless, prove that property was the main object of society. . . . If property, then, was the main object of government, certainly it ought to be one measure of the influence due to those who were to be affected by the government." [4] Mr. King also agreed that "property was the primary object of society;" [5] and Mr. Madison warned the

[1] Elliot's *Debates*, Vol. V, p. 138.
[2] *Readings*, p. 47.
[3] *The Federalist*, No. X; *Readings*, p. 50.
[4] Elliot's *Debates*, Vol. V, p. 279.
[5] *Ibid.*, Vol. V, p. 280.

convention that in framing a system which they wished to last for ages they must not lose sight of the changes which the ages would produce in the forms and distribution of property. In advocating a long term in order to give independence and firmness to the Senate, he described these impending changes: "An increase of population will of necessity increase the proportion of those who will labor under all the hardships of life and secretly sigh for a more equal distribution of its blessings. These may in time outnumber those who are placed above the feelings of indigence. According to the equal laws of suffrage, the power will slide into the hands of the former. No agrarian attempts have yet been made in this country, but symptoms of a levelling spirit, as we have understood, have sufficiently appeared, in a certain quarter, to give notice of the future danger." [1] And again, in support of the argument for a property qualification on voters, Madison urged: "In future times, a great majority of the people will not only be without landed, but any other sort of property. These will either combine, under the influence of their common situation, — in which case the rights of property and the public liberty will not be secure in their hands, — or, what is more probable, they will become the tools of opulence and ambition; in which case there will be equal danger on another side." [2] Various projects for setting up class rule by the establishment of property qualifications for voters and officers were advanced in the convention, but they were defeated. On account of the diversity of opinion that prevailed, agreement was impossible, and it was thought best to trust this matter to the discretion and wisdom of the states.

Nevertheless, by the system of checks and balances placed in the government, the convention safeguarded the interests of property against attacks by majorities. The House of Representatives, Mr. Hamilton pointed out, "was so formed as to render it particularly the guardian of the poorer orders of citizens," [3] while the Senate was to preserve the rights of property and the interests of the minority against the demands of the majority.[4] In the tenth number of *The Federalist*, Mr. Madison argued in a philosophic vein in support of the proposition that

[1] Elliot's *Debates*, Vol. V, p. 243.
[2] *Ibid.*, Vol. V, p. 387.
[3] *Ibid.*, Vol. V, p. 241.
[4] *Ibid.*, Vol. V, p. 203.

it was necessary to base the political system on the actual conditions of "natural inequality." Uniformity of interests throughout the state, he contended, was impossible on account of the diversity in the faculties of men, from which the rights of property originated; the protection of these faculties was the first object of government; from the protection of different and unequal faculties of acquiring property the possession of different degrees and kinds of property immediately resulted; from the influence of these on the sentiments and views of the respective proprietors ensued a division of society into different interests and parties; the unequal distribution of wealth inevitably led to a clash of interests in which the majority was liable to carry out its policies at the expense of the minority; hence, he added, in concluding this splendid piece of logic, "the majority, having such coexistent passion or interest, must be rendered by their number and local situation unable to concert and carry into effect schemes of oppression"; and in his opinion it was the great merit of the newly framed Constitution that it secured the rights of the minority against "the superior force of an interested and overbearing majority." [1]

Drafting a National Constitution

The convention had not proceeded very far in the consideration of the problems before it when the question was raised as to whether the delegates were bound by their instructions to the mere amendment of the Articles of Confederation or were free to make a revolution in the political system. Mr. Paterson argued that the delegates were bound by their instructions: "If the Confederacy is radically wrong, let us return to our states and obtain larger powers, not assume them ourselves. . . . Our object is not such a government as may be best in itself, but such a one as our constituents have authorized us to prepare and as they will approve." [2] Mr. Randolph, however, declared that he "was not scrupulous on the point of power. When the salvation of the republic was at stake, it would be treason to our trust not to propose what we found necessary." [3] With this view, Mr. Hamilton agreed: "We owed it to our country to do on this

[1] *Readings*, p. 50. [2] Elliot's *Debates*, Vol. V, p. 194.
[3] *Ibid.*, Vol. V, p. 197.

emergency whatever we should deem essential to its happiness. The states sent us here to provide for the exigencies of the Union. To rely on and propose any plan not adequate to these exigencies merely because it was not clearly within our powers would be to sacrifice the means to the end." [1]

Fortunately for the cause of national union, these delegates threw off the restrictions placed upon them by their instructions, and frankly disregarded the fact that they had assembled merely to amend the Articles of Confederation, not to make a new instrument of government. They refused to be bound either by the letter or spirit of the Articles or their orders, for they even provided that the new government should go into effect when ratified by nine states, whereas under the Articles unanimous approval was required for any amendment. In order that their purposes should not be discovered and thwarted by public criticism, the convention sat behind closed doors; their proceedings were kept secret; and members were even forbidden to correspond with outsiders on the topics under discussion. Not until the draft was finished did the people know what the convention had done, and even then they did not know the secret forces which had caused the introduction of certain clauses, or the full intention of the framers as to the ways in which the new government was designed to work.

A large majority of the convention had determined to establish a strong national government to take the place of the confederate system, and to do this it was absolutely necessary to throw aside the fundamental features of the Articles of Confederation, which, according to their instructions, they were assembled to amend. On May 30, 1787, five days after the opening of the convention, a resolution was adopted in the Committee of the Whole, "that a national government ought to be established consisting of a supreme legislative, executive, and judiciary." [2] The distinction between a "*federal* and a *national supreme* government," was clearly explained by Gouverneur Morris. "The former," he said, was "a mere compact resting on the good faith of the parties," while the latter had "a complete and compulsive operation"; and he concluded by adding that "in all communities there must be one supreme power and

[1] Elliot's *Debates*, Vol. V, p. 199. [2] *Ibid.*, Vol. V, p. 134.

one only." [1] Mr. Madison, in discussing the problem of representation, observed that "whatever reason might have existed for the equality of suffrage when the Union was a federal one among sovereign states, it must cease when a national government should be put in their place." [2] Mr. Read of Delaware even went so far as to say that the national government must soon of necessity swallow up all the state governments; [3] and Mr. Wilson of Pennsylvania declared that he could not even admit the doctrine that when the colonies became independent of Great Britain they were independent of each other, and contended that the colonies were not declared to be free and independent states individually, but only unitedly.[4] Mr. Hamilton went even further than the other members of the convention in his stanch adherence to the idea of a supreme national government; he advocated the appointment of state executives by the general government and wanted to give Congress the power to legislate on every matter whatsoever.[5]

That it was the desire of a majority of the convention to establish a supreme national government is evidenced in nearly every page of the debates. That such was their intention was explicitly declared by Luther Martin, of Maryland, in a letter to the legislature of his state justifying his conduct in withdrawing from the convention. He contended that the plan of government, as devised by the convention, was "a national not a federal government," and one "calculated and designed not to protect and preserve but to abolish and annihilate the state governments." In criticising the advocates of a strong national government, he continued: "So far were the friends of the system from pretending that they meant it or considered it a federal system, that, at the question being proposed, 'that a union of the states merely federal ought to be the sole object of the exercise of the powers vested in the convention,' it was negatived by a majority of the members; and it was afterwards resolved, 'that a national government ought to be formed.' Afterwards, the word 'national' was struck out by them because they thought the word might tend to alarm; and although now they who advocate this system pretend to call themselves *federalists*, in convention the distinction was quite the

[1] Elliot's *Debates*, Vol. V, p. 133. [2] *Ibid.*, Vol. V, p. 135.
[3] *Ibid.*, Vol. V, p. 163. [4] *Ibid.*, Vol. V, p. 213.
[5] *Ibid.*, Vol. V, p. 205.

reverse; those who opposed the system were there considered and styled the *federal party*, those who advocated it, the *anti-federal*." [1]

In devising this national system it was necessary to make many compromises.[2] In the first place, the small states demanded equal representation and the large states representation according to population; a compromise gave the small states equality in the Senate and the large states proportional representation in the lower House. In the next place, the slave states wished to have slaves counted in the apportionment of representation — a demand which was stoutly opposed by the non-slave states; and a compromise was reached by the provision that in apportioning representation and direct taxes only three-fifths of the total number of slaves should be counted. In the third place, the North, having larger commercial interests than the South, wished to give Congress the power to regulate commerce, but the South, being solicitous of the slave trade, feared its prohibition in case unqualified power was vested in Congress; and the result was a compromise authorizing Congress to regulate commerce, but forbidding it to prohibit the importation of slaves before the year 1808.

In addition to these great compromises which had to be made on account of the diversity among the states in area, population, and wealth, there was a still greater compromise — the most fundamental one of all — the compromise between that party in the nation which wanted a government strong enough to pay the national debt, regulate commerce, protect creditors, and sustain property rights in general, and that other party which was especially concerned about a democratic and confederate form of government. The result here was a compromise which, Madison contended, secured the spirit and form of popular government while preventing direct and simple majority rule.[3]

This compromise, in conjunction with the compromises mentioned above, resulted in the establishment of what is known as the check and balance system. In this system, the President is elected for a four-year term by an indirect process; the Senators are elected for a six-year term (one-third going out every

[1] Elliot's *Debates*, Vol. I, p. 362.

[2] For a contemporary view, *Readings*, p. 45. [3] See *Readings*, p. 52.

two years) by another process — by the state legislatures; the members of the House of Representatives are elected by another process — popular vote — for a term of two years; and over against these three institutions is set a Supreme Court composed of judges appointed by another process — the President and Senate — for life terms, and enjoying the power to declare null and void the unconstitutional acts of the other departments.

It is highly improbable, therefore, that any political party at a single national election may secure an unqualified control over all of these departments of government and rush through any extremely radical measure. This system is eloquently described in a little anecdote related of Jefferson and Washington. The former on one occasion was advancing many objections to a bicameral legislature, when Washington replied, "You yourself have proved the excellence of two houses this very moment." Astonished at this Jefferson inquired, "I? How is that, General?" "You have," explained Washington, "turned your hot tea from the cup into the saucer to get cool. It is the same thing we desire of the two houses."

Fundamental Features of the New System

1. The Articles of Confederation provided no separate executive department charged with the high function of enforcing federal law. This grave defect was carefully considered by the convention, and warmly discussed by the advocates of the new system. All were agreed that a strong executive power was indispensable, but they were uncertain as to whether such an important authority should be vested in a single person or in a directorate. They also had no little difficulty in deciding on the method by which the chief magistrate was to be elected.

On the point of a single executive armed with large powers, Hamilton argued with great cogency: "Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks. It is not less essential to the steady administration of the laws, to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice, to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.

Every man, the least conversant with Roman story, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome." [1]

Such weighty considerations prevailed in the convention, and an executive department with a single head endowed with regal powers was created. To meet the objection of those who were afraid of intrusting too much political control to the mass of the people, it was decided that the President should be chosen indirectly by electors appointed as the legislatures of the several states might determine.

2. No less grave defects were inherent in the legislature created by the Articles of Confederation. Three, in particular, engaged the attention of the convention: the equality of the several states, large and small, in voting power; the instability of a single chamber; and the absence of direct representation of the people in the Congress — the delegates being appointed by their respective state legislatures and thus dependent upon the states as corporate entities rather than upon the people thereof. The convention accordingly decided upon a bicameral legislature: a Senate affording equal representation to all states and a House composed of representatives apportioned among the states on a basis of population. Moreover, the significant fact must not be overlooked, that it was provided that the members of the new Congress were to be paid from the national treasury and thus relieved from all dependence upon state revenues. "If the states were to pay the members of the national legislature," said Randolph in the convention, "a dependence would be created that would vitiate the whole system. . . . The national treasury, therefore, is the proper fund for supporting them." [2]

3. The crowning defect of the Articles, according to Hamilton, was the want of a central judiciary. The old Congress had no authority to organize courts of general jurisdiction, although it could act as a tribunal of "last resort on appeal in all

[1] *The Federalist*, No. LXX. [2] Elliot's *Debates*, Vol. V, p. 226.

disputes and differences arising between two or more states concerning boundary, jurisdiction, or any other cause whatever." [1] It therefore had no way of enforcing federal laws by judicial process,[2] and as Hamilton said: "Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as a part of the law of the land. Their true import as far as respects individuals, must like all other laws be ascertained by judicial determinations. To produce uniformity in these determinations they ought to be submitted in the last resort to one supreme tribunal." [3] Moreover, Hamilton, fearing the aggression of the legislature, believed that the court should have the power of declaring laws unconstitutional. Accordingly a Supreme Court, and inferior courts to be erected by Congress, were given jurisdiction over all cases arising under the Constitution, federal laws, and treaties — a jurisdiction by later congressional enactment and judical decision interpreted to include the power of declaring state and federal laws unconstitutional.

4. The financial and commercial objections to the Articles of Confederation were met by two important provisions. The necessity of depending upon the state legislatures for federal funds was entirely eliminated by the clause authorizing Congress to raise revenues by taxes, duties, and excises bearing immediately upon the people as individuals. The continuation of the commercial warfare among the states was prevented by the clause empowering Congress to regulate commerce among the several states and with foreign nations, as well as with the Indians. The national government was also authorized to establish uniform bankruptcy laws and thus exercise at will an effective check upon the shrewdly devised state legislation through which debtors sought to escape from some of their obligations.[4]

No less important for financial and commercial purposes were the restrictions laid upon the powers of the states. They were forbidden to emit bills of credit, make anything but gold and silver coin tender in payment of debts, pass ex post facto laws, lay duties on imports or exports (except with the consent of Congress for specific purposes), lay tonnage duties, or pass any law impairing the obligation of contract.

[1] See *Readings*, p. 30.
[2] Except in maritime and admiralty matters.
[3] *The Federalist*, No. XXII.
[4] See *Readings*, pp. 236 ff.

5. Special effectiveness was given to the new powers conferred upon the national government by authorizing it to deal with individuals instead of thirteen distinct and separate states. Hence it was no longer possible for states to violate and disregard treaties made by the federal government, or to look upon federal laws as mere recommendations to be obeyed if desirable or neglected altogether.

6. Of particular significance was the clause providing for future amendments. The Articles of Confederation had stipulated that no alteration should be made without the approval of Congress and ratification by the legislature of every state. The new Constitution bound every state to an amendment, in case it was approved by two-thirds of both houses of Congress and ratified by three-fourths of the states. Even this system, as events have proved, has required such extraordinary majorities as to make amendments by regular process well-nigh impossible. Radical as this departure may have seemed to the ardent champion of states' rights, it was not radical enough for Patrick Henry, for he declared in the Virginia convention called to ratify the Constitution that "Four of the smallest states, that do not collectively contain one-tenth part of the population of the United States, may obstruct the most salutary and necessary amendments. . . . A bare majority in these four small states may hinder the adoption of amendments; so that we may fairly say and justly conclude that one-twentieth part of the American people may prevent the removal of the most grievous inconveniences and oppression by refusing to accede to amendments. . . . Is this an easy mode of securing the public liberty? It is, sir, a most fearful situation when the most contemptible minority can prevent the alteration of the most oppressive government; for it may, in many respects, prove to be such." [1]

The Ratification of the Constitution

It is evident from an examination of these departures from the Articles of Confederation that a revolution in our political system was contemplated by the framers of the Constitution. They were doubtless unaware of all the national implications

[1] Elliot's *Debates*, Vol. III, pp. 48–50.

contained in the instrument which they drafted, but they knew very well that the state legislatures, which had been so negligent in paying their quotas under the Articles and which had been so jealous of their rights, would probably stick at ratifying such a national instrument of government. Accordingly they cast aside that clause in the Articles requiring amendments to be ratified by the legislatures of all the states; and advised that the new Constitution should be ratified by conventions in the several states composed of delegates chosen by the voters. They furthermore declared — and this is a fundamental matter — that when the conventions of nine states had ratified the Constitution the new government should go into effect so far as those states were concerned. The chief reason for resorting to ratifications by conventions is laid down by Hamilton in the twenty-second number of *The Federalist:* "It has not a little contributed to the infirmities of the existing federal system that it never had a ratification by the people. Resting on no better foundation than the consent of the several legislatures, it has been exposed to frequent and intricate questions concerning the validity of its powers; and has in some instances given birth to the enormous doctrine of a right of legislative repeal. Owing its ratification to the law of a state, it has been contended that the same authority might repeal the law by which it was ratified. However gross a heresy it may be to maintain that a party to a compact has a right to revoke that compact, the doctrine itself has respectable advocates. The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of the consent of the people. The streams of national power ought to flow immediately from that pure original fountain of all legitimate authority."

Of course, the convention did not resort to the revolutionary policy of transmitting the Constitution directly to the conventions of the several states. It merely laid the finished instrument before the confederate Congress with the suggestion that it should be submitted to "a convention of delegates chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification; and each convention assenting thereto and ratifying the same should give

notice thereof to the United States in Congress assembled."[1] The convention went on to suggest that when nine states had ratified the Constitution, the confederate Congress should extinguish itself by making provision for the elections necessary to put the new government into effect.[2] "What they [the convention] actually did, stripped of all fiction and verbiage," says Professor Burgess, "was to assume constituent powers, ordain a Constitution of government and of liberty, and demand the *plébiscite* thereon, over the heads of all existing legally organized powers. Had Julius or Napoleon committed these acts, they would have been pronounced *coups d'état*. Looked at from the side of the people exercising the *plébiscite*, we term the movement revolution. The convention clothed its acts and assumptions in more moderate language than I have used, and professed to follow a more legal course than I have indicated. The exact form of procedure was as follows. They placed in the body of the proposed Constitution itself a provision declaring that ratifications by conventions of the people in nine states (commonwealths) should be sufficient for the establishment of the Constitution between the states (commonwealths) so ratifying the same. They then sent the instrument entire to the Confederate Congress, with the direction, couched in terms of advice, that the Congress should pass it along, untouched, to the legislatures of the commonwealths, and that these should pass it along, also untouched, to conventions of the people in each commonwealth, and that when nine conventions should have approved, Congress should take steps to put the new government into operation and abdicate. Of course the mass of the people were not at all able to analyze the real character of this procedure. It is probable that many of the members of the convention itself did not fully comprehend just what they were doing. Not many of them had had sufficient education as publicists to be able to generalize the scientific import of their acts." [3]

After the new Constitution was published and transmitted to the states, there began a determined fight over its ratification. A veritable flood of pamphlet literature descended upon the coun-

[1] For document illustrating process of ratification, *Readings*, p. 54.
[2] *Readings*, p. 53.
[3] Burgess, *Political Science and Constitutional Law*, Vol. I, p. 105

try, and a collection of these pamphlets by Hamilton, Madison, and Jay, brought together under the title of *The Federalist* — though clearly a piece of campaign literature — has remained a permanent part of the contemporary sources on the Constitution and has been regarded by many lawyers as a commentary second in value only to the decisions of the Supreme Court. Within a year the champions of the new government found themselves victorious, for on June 21, 1788, the ninth state, New Hampshire, ratified the Constitution, and accordingly the new government might go into effect as between the agreeing states. Within a few weeks, the nationalist party in Virginia and New York succeeded in winning these two states, and in spite of the fact that North Carolina and Rhode Island had not yet ratified the Constitution, Congress determined to put the instrument into effect in accordance with the recommendations of the convention. Elections for the new government were held; the date March 4, 1789, was fixed for the formal establishment of the new system; Congress secured a quorum on April 6; and on April 30, Washington was inaugurated at the Federal Hall in Wall Street, New York.

CHAPTER IV

THE EVOLUTION OF THE FEDERAL CONSTITUTION

If we use the term "Constitution" in the narrow sense as including only the provisions of the written instrument itself, the history of its development would be brief; but such a restriction of the term would be sheer formalism, and a history based upon such an interpretation would be utterly misleading. For constitutional law, as Professor Dicey points out, includes all the fundamental rules which directly or indirectly affect the distribution and exercise of sovereign power; it includes among other things the laws which define the suffrage, regulate the prerogatives of the chief magistrate, prescribe the form of the legislature, and determine the structure and functions of the hierarchy of officials. A comparison, therefore, of the existing body of law and custom relative to such matters with that obtaining in the United States on the morning when Washington took the oath of office in Wall Street reveals most astonishing changes. Only eighteen new clauses, it is true, have been added by way of amendment to the written document, but Congress has filled up the bare outline by elaborate statutes; party operations have altered fundamentally the spirit and working of much of the machinery; official practice has set up new standards from time to time; and the Supreme Court, by generous canons of interpretation, has expanded, in ways undreamed of by the Fathers, the letter of the law. In fact, the customs of our Constitution form as large an element as they do in the English constitution. A correct appreciation of the evolutionary character of the federal system is, therefore, necessary for a true understanding of the genius of the American political institutions.

The Federal Amending Process

The most obvious changes in our Constitution are, of course, those that have been effected by the amendments, all of which are to be understood in connection with the historical circum-

stances that called them into existence. The system of amendment provided by the framers of the Constitution, while very simple in its nature, requires such extraordinary majorities both for initiation and ratification that, in practice, with the exception of the first eleven articles, no change has been made save under circumstances of a serious character.

There are, in reality, four possible ways of amending the Constitution, although in practice only one has been used. A proposition to amend may originate in Congress, on the approval of two-thirds of both houses, and may be ratified by the concurrence of the legislatures, or of conventions, as Congress may determine, in three-fourths of the states. On the other hand, Congress, on the application of the legislatures of two-thirds of the states, must call a national convention for the purpose of drafting amendments which may be ratified by conventions, or by legislatures in three-fourths of the states. The composition of the national and state conventions, the procedure to be followed by the state legislatures in passing upon amendments, and numerous other questions are left unsettled by the brief article in the Constitution,[1] but it is to be presumed that Congress may make such reasonable elaborations as it may see fit.

On the occasions in which the federal Constitution has been amended, Congress has been very brief in its provisions.[2] A proposition for an amendment is submitted by a resolution in the following form: "Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled, two-thirds of both houses concurring, That the following article be proposed to the legislatures of the several states as an amendment to the Constitution of the United States which when ratified by three-fourths of the said legislatures shall be valid as part of the said Constitution." The states are then left to their own devices in approving or rejecting the proposal, Congress merely directing that "Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate laws,

[1] Burgess, *Political Science and Constitutional Law*, Vol. I, p. 146.

[2] See *Readings*, pp. 56 ff.

with his certificate specifying the states by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."

The requirement of the approval of an exceptionally large number of states and the principle of allowing states equal weight, regardless of their population or wealth, has been the subject of much adverse criticism, from the protest of Patrick Henry, which we have noted, down to the objections of the most recent commentators. Professor Burgess makes an exceptionally powerful argument against the federal amending system: "When I reflect that, while our natural conditions and relations have been requiring a gradual strengthening and extension of the powers of the central government, not a single step has been taken in this direction through the process of amendment prescribed in that article, except as the result of civil war, I am bound to conclude that the organization of the sovereign power within the Constitution has failed to accomplish the purpose for which it was constructed. . . . When a state must have recourse to war to solve the internal questions of its own politics, this is indisputable evidence that the law of its organization within the constitution is imperfect; and when a state cannot so modify and amend its constitution from time to time as to express itself truthfully therein, but must writhe under the bonds of its constitution from time to time until it perishes or breaks them asunder, this is again indisputable evidence that the law of its organization within the constitution is imperfect and false. . . . When in a democratic political society, the well-matured, long, and deliberately formed will of the undoubted majority can be persistently and successfully thwarted, in the amendment of its organic law, by the will of the minority, there is just as much danger to the state from revolution and violence as there is from the caprice of the majority where the sovereignty of the bare majority is acknowledged." [1]

The extraordinary majorities required for the initiation and ratification of amendments, for a long time, seemed to make it impossible to amend the Constitution under ordinary circumstances. It was constantly pointed out that only the war power

[1] *Political Science and Constitutional Law*, Vol. I, pp. 150 ff.

in the hands of the federal government secured the passage of the great clauses relating to slavery and civil rights. An observant scholar, Professor J. Allen Smith, estimated that, on the basis of the census (1900), one forty-fourth of the population distributed so as to constitute a majority in the twelve smallest states could prevent the ratification of a proposed amendment, even after it had got the requisite two-thirds vote in both Houses of Congress.[1] This anomalous situation led to a demand for a change in the amendment process itself; and in 1912 Senator La Follette introduced an amendment to the amendment clause permitting future amendments by a majority of both houses of Congress on approval of a majority of the voting population in a majority of the states. The comparative ease with which the Sixteenth, Seventeenth, and Eighteenth amendments were passed by Congress and ratified by the states appeared to refute the notion that the Constitution was too rigid for a progressive democracy.

The Adoption of Amendments I–XVIII to the Constitution

The first ten articles of amendment to the Constitution were adopted so closely after the ratification of the original instrument that they may be deemed almost a part of it. During the struggles which occurred in many states over the acceptance of the new plan of government, it was manifest that a great deal of the opposition to it was based on the absence of any provisions expressly safeguarding individual rights against the action of the federal government. Jefferson, who was in Paris at the time the convention finished its work, wrote to a friend in Virginia that he wished four states would withhold ratification until a declaration of rights could be annexed, stipulating "freedom of religion, freedom of the press, freedom of commerce against monopolies, trial by jury in all cases, no suspensions of habeas corpus, no standing armies."[2] Most of the state constitutions had provided such limitations on their governments, and there was evidently a desire on the part of many, who otherwise approved the Constitution, to see the ancient doctrines on private rights embodied in it. Seven of the ratifying state conventions even

[1] *The Spirit of American Government*, 1907, pp. 46 ff.

[2] Quoted in Curtis, *Constitutional History of the United States* (1889), Vol. I, p. 669, note.

put their wishes in the concrete form of a total of one hundred and twenty-four articles of amendment to be added to the Constitution.[1]

In *The Federalist*, Hamilton argued ably that such provisions were superfluous and even dangerous, because they contained various exceptions to power not actually granted, and would thus afford a colorable pretext to claim more than was granted. "For," he contended, "why declare that things shall not be done which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a right to prescribe proper regulations concerning it was intended to be vested in the national government."[2]

This very plausible argument was met with great cogency by Madison, introducing the proposed amendments in Congress in June, 1789; and the history of the Alien and Sedition laws later bore out the contentions he advanced. He admitted that the new government was limited to certain particular objects, but pointed out that even within the most narrowly circumscribed limits the government would have a discretionary power liable to abuse, and furthermore that this abuse was all the more probable in view of the express provision that Congress could make all laws necessary and proper for carrying into execution the powers expressly vested in the government of the United States. In support of this, Madison cited a single instance: "The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means of enforcing the collection are within the direction of the legislature; may not general warrants [of arrest] be considered necessary for the purpose, as well as for some purposes which it was supposed, at the framing of their

[1] Ames, *Proposed Amendments to the Constitution of the United States*, pp. 183 ff.

[2] *The Federalist*, No. LXXXIV.

constitutions, the state governments had in view? If there was any reason for restraining the state governments from exercising this power, there is like reason for restraining the federal government." [1] He then went on to state that it was his conviction that such a measure would rally large numbers to the cause of Federalism, and that, on principles of amity and moderation, the great rights of mankind secured under the Constitution ought to be expressly declared. After a delay of two months, the House passed seventeen amendments, which were reduced to twelve in the Senate, slightly modified at a joint conference committee, and submitted to the states, by two-thirds vote on September 25, 1789, with an accompanying resolution to the effect that it had been done to extend the ground of public confidence in the government and best insure the beneficent ends of its institution. Two of the amendments dealing with apportionment and payment of members of Congress failed to receive the approval of the requisite number of states, but the other ten were ratified by eleven commonwealths, Virginia being the last to add her sanction, December 15, 1791.

The Eleventh Amendment, providing that the judicial power of the United States shall not extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state, was the direct outgrowth of a judicial decision rendered by the Supreme Court in the case of Chisholm *v.* Georgia in 1793. That case involved the question as to whether a state could be sued by a private citizen; and the champions of states' rights stoutly held that the Supreme Court could not try an action by a citizen against a "sovereign state." The Court, however, held that it possessed such jurisdiction, directed the service of papers on the governor and attorney-general of Georgia, and ordered that, unless the state appeared in due form, judgment should be entered by default.

This decision instantly aroused the indignation of the advocates of states' rights. The decision of the Court was reached on February 18, 1793; and two days later Senator Sedgwick, of Massachusetts, introduced into Congress the proposed amendment. The Massachusetts legislature soon afterward declared the power exercised by the Supreme Court "dangerous to the

[1] *Annals of Congress*, Vol. I, pp. 440 ff.

peace, safety, and independence of the several states and repugnant to the first principles of a Federal government"; and the Georgia house of representatives passed an act providing that any official who attempted the enforcement of the decision should be declared guilty of felony and suffer death without benefit of clergy by being hanged.[1] The proposed amendment, which was sent to the states by Congress in 1794, received the requisite approval of three-fourths of the states, and went into force in 1798.

Little more than two years had elapsed after the ratification of the Eleventh Amendment before a more serious crisis, in the presidential election of 1800, demonstrated the imperative necessity of reconstructing the section of the Constitution dealing with the balloting of the electors for President. The original system, which was prepared without taking into account the rise of parties and their effect on the framework of the government, provided that the presidential electors chosen in each state should cast their ballots for two persons, without designating which was to be President or Vice-President; and then added: "The person having the greatest number of votes shall be President, if such number be a majority of the whole number of electors appointed: and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then, from the five highest on the list, the said House shall in like manner choose the President," the representation from each state having one vote.

In the election of 1800, Jefferson and Burr received seventy-three votes each, and the latter, willing to defeat what he knew to be the real wishes of his party, sought to secure his election to the presidency by gaining enough votes from the Federalists in the House of Representatives where the election had been thrown under the constitutional provision. Fortunately his design was frustrated; but the outcome of the contest, and the low intrigue which accompanied it, revealed the necessity of requiring the electors to designate the persons for whom they cast their ballots as President and Vice-President respectively.

[1] Professor H. V. Ames, in his valuable collection, *State Documents on Federal Relations*, pp. 7 ff., gives this act and citations of authorities.

Accordingly an amendment to effect this reasonable change was introduced into the House of Representatives in February, 1802.[1] The arguments advanced in favor of it were simple and direct: the suffrages given for the election of the agents of government ought to be an expression of public will; any provision liable to lead to the appointment of a person not originally intended by a majority of the electors defeats the first principles of the American system; and finally, what more serious calamity could be imagined than a continued division of the House of Representatives — in case the choice should fall there — which might result in indefinite delay of a presidential election — by no means an impossible contingency.[2] The arguments against the proposal were singularly weak: it was urged in favor of the smaller states that they would have a better chance of securing one or the other of the offices if the existing system was retained, because it threw contested elections into the House of Representatives where all states had an equal vote; and finally it would destroy the original design of having two of the ablest characters chosen without discrimination for the high office.[3] Nevertheless, the proposal, which received the requisite majority in Congress and then went to the states in December, 1803, was promptly ratified and declared in force on September 25, 1804, as the Twelfth Amendment.

An eventful half century now passed before any further changes were made in the law of the Constitution. Vast territories stretching to the Pacific were acquired; nearly a score of states were added to the Union; the development of industries and the extension of railways began to work a marvellous transformation in the economic system of the country; state constitutions were remodelled over and over, showing at each successive decade an advance in democratic ideas of government; practices of every kind stretched beyond recognition many of the original terms of the written instrument; and yet no changes could be made in the formal rules of the document itself until, in the hot struggles of the Civil War, the whole political system was thrown into the melting pot.

In March, 1862, less than a year after the opening of the

[1] Such an amendment had really been proposed earlier.

[2] *Annals of Congress*, 8th Cong., 1st Sess., pp. 490 ff.

[3] *Ibid.*, 8th Cong., 1st Sess., pp. 691 ff.

conflict between the states, Congress abolished slavery in the territories, the following month slaves were emancipated in the District of Columbia, and in September, 1862, shortly after the check administered to Lee at the battle of Antietam, Lincoln issued his proclamation announcing that the slaves in those states which had not returned to their allegiance by January 1, 1863, would be treated as free.

However, the Proclamation of Emancipation, which duly went into effect, might not of its own force have prevented the restoration of slavery by the Confederate States if they were brought back into the Union; and accordingly, in December, 1863, simultaneous resolutions were introduced into the House and Senate, providing for an amendment forever prohibiting slavery. In a speech delivered in the Senate in support of the amendment, Mr. Trumbull put the situation concisely: "In my judgment, the only effectual way of ridding the country of slavery, and so that it cannot be resuscitated, is by an amendment of the Constitution forever prohibiting it within the jurisdiction of the United States. This amendment adopted, not only does slavery cease, but it can never be reëstablished by state authority or in any other way than by amending the Constitution. Whereas, if slavery should now be abolished by act of Congress or proclamation of the President, assuming that either had the power to do it, there is nothing in the Constitution to prevent any state from reëstablishing it. . . . It is very generally conceded, I believe, by men of all political parties, that slavery is gone, that the value of slavery is destroyed by the rebellion. What objection then can there be on the part of any one in the present state of public feeling in the country, to giving the people an opportunity to pass on the question?" [1]

It was apparent, however, to every one that pressure would have to be exercised on the conquered southern states in order to secure the requisite three-fourths for the adoption of the amendment. This was a ground for the objections urged by Mr. Pendleton in the House of Representatives against the passage of the resolution. "It is impossible," he declared, "that the amendment proposed should be ratified without a fraudulent use — I select the term advisedly — without a fraudulent use

[1] *Congressional Globe*, 38th Cong., 1st Sess., p. 1313.

of the power to admit new states or a fraudulent use of the military power of the federal government in the seceded states. There are thirty-five states. Twenty-seven are necessary to ratify this amendment. There are nineteen free states. Suppose you get them all, where do you get the others? . . . Will the gentlemen call on the southern states to furnish the requisite number? If these states are to vote in their present condition, it would be a broad farce, if it were not a wicked fraud."[1] Curiously enough, it was even urged against the measure that "neither three-fourths of the states, nor all the states save one, can abolish slavery in that dissenting state, because it lies within the domain reserved entirely to each state for itself and upon it the other states cannot enter."

So great was the opposition to the resolution that it failed at first to secure the requisite two-thirds in the House of Representatives; but Lincoln in his message of December 6, 1864, after his reëlection, warned Congress that it was only a question of time until slavery would have to go. Speaking of the election, he said, "It is the voice of the people now for the first time heard upon the question. In a great national crisis like ours, unanimity of action among those seeking a common end is very desirable. Yet no approach to such unanimity is attainable unless some deference is paid to the will of the majority simply because it is the will of the majority."[2] This appeal was successful, and after a long and exciting debate the amendment was passed at the opening of 1865. It was then sent out to the states and ratified by twenty-seven of them, among which were Nevada, which had been admitted for the purpose, and several southern states, acting under the pressure of the federal military authority. The Thirteenth Amendment, thus carried through, was declared in force by the Secretary of State on December 18, 1865.

The radical Republicans, headed by the indomitable Thaddeus Stevens, were not content with abolishing slavery; they were determined also to give to the newly emancipated negroes all the civil rights which the whites enjoyed, to impose disabilities on certain secessionists, and to secure the validity of the federal

[1] *Congressional Globe*, p. 2993; see below, chap. x, for Dana's account of the method employed by Lincoln in securing the adoption of the Thirteenth Amendment.

[2] Richardson, *Messages and Papers of the President*, Vol. VI, p. 252.

war debt. By the Civil Rights Act of April, 1866, they sought to remove all the incidents of slavery and secure for negroes equality before the law; but realizing that a mere act could be repealed at any time by a subsequent Congress, they decided to place the principles of civil liberty high above the reach of party factions by securely establishing them in the Constitution itself. Accordingly, in June, 1866, Congress passed the Fourteenth Amendment, designed among other things to assure citizenship, civil rights, and the suffrage to the freedmen. By refusing to readmit certain southern states until they had accepted this radical alteration in our political system, the requisite number of ratifications was at length secured; and the Fourteenth Amendment was promulgated by the Secretary of State in July, 1868.[1]

The indirect method (provided by the Fourteenth Amendment) of securing the vote to the negroes through the threat to reduce the representation of any state excluding them from the suffrage, it was feared, would not be effective enough in practice; and the Republicans accordingly decided to complete the work of reconstruction by expressly forbidding any commonwealth to deprive any citizen of the right to vote on account of race, color, or previous condition of servitude. Some of the northern states still denied the franchise to negroes, and this was a standing reproach to the reformers, who insisted on granting this right in the South in opposition to the known wishes of the whites. It, therefore, seemed expedient to some, and to others abstractly just, to prevent political discrimination against the negro throughout the entire Union; and to achieve this end, the Fifteenth Amendment was passed by Congress in February, 1869, and declared ratified on March 30, 1870. Thus was ended the formal revolution wrought in our political system by the Civil War.

Forty-three years then elapsed before another amendment was added to the Constitution, in spite of the fact that a large crop of proposed changes was produced in every Congress during the intervening period. It was not until July, 1909, that a two-thirds majority could be secured in both houses to any change in the fundamental law. At that time, a resolution was duly passed providing that Congress "shall have power to lay and collect taxes on incomes, from whatever source derived, without

[1] See *Readings*, p. 393, for the Amendment. See also Appendix.

apportionment among the several states and without regard to any census or enumeration." This amendment was designed to get around the decision of the Supreme Court in 1895 when it declared the income tax law of the previous year unconstitutional.[1] The Sixteenth Amendment was duly ratified, and was proclaimed in force on February 25, 1913.

The Seventeenth Amendment, providing that United States Senators shall be elected by "the people" of the several states, that is, by electors having the qualifications of voters for the most numerous branch of the state legislature, was adopted by Congress in May, 1912, and speedily ratified.[2] This proposal had been brought up in Congress many times, and it had been passed more than once by the requisite majority in the House of Representatives; but the Senate had defeated it on every occasion until June, 1911, when it passed a resolution providing for popular election. A deadlock between the two houses then followed, and it was not until a year later (1912) that the two bodies were able to agree. The amendment was declared in force on May 31, 1913.

The Eighteenth Amendment, proclaimed on January 29, 1919, provided that one year after ratification the manufacture, sale, and transportation within, the importation into and the exportation from the United States, of intoxicating liquors for beverage purposes should be prohibited. The amendment applies to all territories subject to the United States.

On June 4, 1919, Congress submitted to the states an amendment providing that no citizen of the United States shall be denied the right to vote "on account of sex." This act on the part of Congress closed, in Washington, the long agitation for woman suffrage which began before the Civil War. By April, 1920, thirty-five states, out of the necessary thirty-six, had ratified the proposed amendment.

The last three amendments illustrate in a peculiar way the relation of our state and federal systems. All of the propositions were before Congress for a long time and repeatedly rejected. Advocates, however, kept at work in the states, bringing about popular election of Senators, prohibition, and woman suffrage, state by state, until they made all three issues inescapable at Washington. Then Congress acted.

[1] See below, p. 360.

[2] See below, p. 243.

Statutory Elaboration of the Constitution

It would be a mistake, of course, to confuse the formal amendments, which we have just considered, with statutes, especially in the matter of the sanction which each of the two forms of law has behind it. The former are placed beyond the reach of the legislature by an extraordinary process of enactment, and can be abrogated only by a similar process. A statute, on the other hand, is made by Congress, and may be altered or repealed at any time by the same body without further authority. Nevertheless, when viewed from the standpoint of content, there is no real intrinsic difference between many statutes and the provisions of the Constitution itself; and, if we regard as constitutional all that body of law relative to the fundamental organization of the three branches of the federal government, — legislative, executive, and judicial, — then by far the greater portion of our constitutional law is to be found in the statutes. At all events, whoever would trace, even in grand outlines, the evolution of our constitutional system must take them into account.

Such, for instance, are the laws organizing all the executive departments which have grown out of the authority conferred by the barest mention in the Constitution of the facts that some appointments may be made by the "heads of departments," and that the President "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices." To take another example, the Twelfth Amendment is scarcely more important than the statute of 1887, which elaborates it in great detail by providing the modes of counting the electoral votes and determining controversies. Indeed, Senator Garland, at the time, declared such a statute amendatory in its nature and beyond the power of Congress. Whether the statute in question is one which the framers of the Constitution would have deemed within the letter of the written document it is obviously impossible to determine; it may quite properly be regarded as an amendment which the general acceptance of the nation allows to stand in force as a mere statute. Such reasoning is not without justification, and finely illustrates the shadowy character of the distinctions between constitutional and statute law.

Again, the federal statute of 1866 [1] regulating the election of Senators by the state legislatures and controlling their internal procedure in this matter may be regarded as constitutional in character in so far as it was linked organically with the provisions of the Constitution. A striking and curious illustration of the way in which the federal system has been in part altered by state action is the practice, adopted in some commonwealths, of requiring the legislature to choose for the United States Senate the nominee indicated by popular vote — a practice undoubtedly contrary to the letter of the Constitution and to the intention of the framers.

The Custom of the Constitution

It is the fashion for English publicists to congratulate their American colleagues on the simplicity of the task of commenting on a written constitution as compared with the complicated task of unravelling from fluctuating party customs the mysteries of the English political system. "Whatever may be the advantages of a so-called 'unwritten' constitution," declares Professor Dicey, "its existence imposes special difficulties on teachers bound to expound its provisions. Any one will see that this is so who compares for a moment the position of writers such as Kent and Story, who commented on the Constitution of America, with the situation of any person who undertakes to comment on the constitutional law of England. When these distinguished jurists delivered, in the form of lectures, commentaries upon the Constitution of the United States, they knew precisely what was the proper subject of their teaching and what was the proper mode of dealing with it. The theme of their teaching was a definite assignable part of the law of their country; it was recorded in a given document to which all the world had access, namely, 'the Constitution of the United States established and ordained by the People of the United States.'" [2]

Now, as a matter of simple fact, any one who relied upon the commentaries of these distinguished jurists for a knowledge of the actual government of the United States would not penetrate beyond the outer boundaries of the subject. For example, Kent dismisses the topic of the Speaker of the House of Representatives with this sentence: "The House of Representatives

[1] See *Readings*, p. 21. [2] *The Law and Custom of the Constitution*, chap. i.

choose their own Speaker." This statement throws as much light on our federal government as the observation that the prime minister for the time being is the First Lord of the Treasury throws on the British cabinet system. Surely no commentator on the British constitution would leave out of account the entire cabinet system and its vital relation to party practices.

Indeed, the most complete revolution in our political system has not been brought about by amendments or by statutes, but by the customs of political parties in operating the machinery of the government.[1] So radical is this transformation in the letter and spirit of the system of 1789, and so completely does it extend to the utmost extremities of that system, that it seems necessary to devote special chapters to an examination of its diverse aspects.[2] A few examples, however, will be given here to illustrate concretely the ways in which party practices transform the written law.

1. The Constitution tells us that the President is elected by electors chosen as the legislatures of the states shall see fit. In practice a few candidates are selected at national party conventions, — institutions wholly unknown to federal law; the electors are figureheads selected by the parties and bound to obey party commands; and the voters merely have the right to choose between the candidates nominated.

2. The Constitution informs us that the Senators are elected by the "people" of the states; but to understand how Senators are really chosen it is necessary to examine the direct nomination laws and party practices in the several states.

3. The Constitution states that the Speaker is chosen by the House of Representatives. In fact, he is selected by a caucus of the majority members of the House.

4. In the view of the Constitution the Speaker is the impartial presiding officer of the House. In fact, he is one of the leaders of the majority party in that body.

5. The Constitution informs us that revenue bills must originate in the lower House. In plain fact, revenue bills originate in the Senate quite as much as in the House, although the latter body nominally exercises its prerogative.[3]

[1] On this important subject, see Goodnow, *Politics and Administration.*

[2] Chaps. vi, vii, and xxx, and *Readings*, chaps. vi, vii, and xxx.

[3] See below, chap. xviii.

6. The Constitution says very little about legislative procedure, but the whole spirit and operation of Congress depend upon the rules, organization of committees, and agreements among the leaders of the majority party.

Closely related to the alterations introduced into the original system by party methods are the changes wrought in the presidential office by the exigencies of party leadership. This aspect of our constitutional evolution is regarded by some as an apparently fortuitous contingency dependent upon the personality of the President and the circumstances under which he carries on his administration, but by others it is considered as a permanent and salutary outcome of our political development. It would be interesting to know, at all events, the feelings that would be entertained by a member of the federal convention of 1787 if he could compare the deliberate and austere administration of Washington with that of Mr. Roosevelt, who was preeminently a party leader. Through his personal representative he participated in the gubernatorial campaign in New York in 1906; he aided Congressman Burton in his contest with Mr. Johnson for the mayoralty of Cleveland; and finally he was chiefly instrumental in selecting his own successor. Mr. Taft likewise declared his belief in the duty of the President to act as party leader and assume party responsibilities. Mr. Wilson's control over the legislative policies of the Democratic Congress for six years amounted to almost a dictatorship. It requires no far stretch of the imagination to believe that the original framers would regard the recent developments as entirely beyond their intentions. This is not meant to imply any criticism of such presidential policies, but it shows how the American people are actually not very much hampered in practice by constitutional theories.

Judicial Expansion of the Constitution

While there is a large and eminently respectable school of thinkers who maintain that the courts do not make law, it nevertheless remains a fact that the Supreme Court of the United States has on several occasions expanded the written instrument under the guise of an interpretation. Indisputable evidence of this fact is offered by the reversals of opinion showing that

either in one case or the other the Court had read into the document ideas which it did not contain. Furthermore, the numerous dissenting opinions, often by the considerable minority of four to five, lend the weight of eminent authority to the contention raised in many quarters that certain decisions are not mere applications of the letter and spirit of the Constitution to specific circumstances, but positive additions to the venerable fabric which the convention constructed. This, of course, is controversial ground, but a few illustrations will make clear what is meant by those who maintain, without any intention of adverse criticism, that the Supreme Court *makes* constitutional law from time to time to meet the demands of new circumstances, or to express the opinion of the Court as to what ought to be the law.[1]

A notable instance is the case of Chisholm *v.* Georgia, mentioned above, in which the Court took jurisdiction over a suit against a state by a citizen. That it was not the intention of the states at the time of the ratification to confer such jurisdiction is evidenced by the general protest which went up against it and the facility with which an amendment was provided. Furthermore, Hamilton in *The Federalist* had expressed his belief that no such power was given by the Constitution, and the general principles of law up to that time seem to have been contrary to the ruling of the Court; but the Court, desiring to make the Constitution a broadly national instrument, assumed jurisdiction over the suit against Georgia. A more notable case was that of Marbury *v.* Madison, in which the Court decided for the first time that it had power to declare invalid statutes of Congress which it deemed contrary to the Constitution. Whether the majority in the convention intended to bestow such high prerogative on the federal tribunal is a matter of controversy. Certain it is that some of the members, notably Hamilton, ascribed such a power to the Court; but no express warrant was conveyed by the document itself, and there is some reason for holding that such might not have been the general intention of those who ratified the instrument. Later the Court extended the clause forbidding any state to pass a law impairing the obligation of contract to cover even agreements made by

[1] *Readings*, p. 62.

the states themselves in the form of charters and concessions, a ruling which, however expedient from the standpoint of the protection of private rights, certainly widened the meaning of the term "contract," as generally understood at the time.[1] To cite a more recent example: until the acquisition of our insular dependencies, an achievement as far beyond the range of the vision of the convention of 1787 as any imaginable, the Court had uniformly ruled that the provisions safeguarding individual liberty, laid down in the first ten amendments, restricted the federal authorities everywhere, in the government of territories as well as in the districts organized into states; but when it became apparent that such practices of Anglo-Saxon peoples as indictment and trial by jury were not applicable to peoples in other stages of culture and with diverse historical antecedents, the Court, by a process more subtle than logical, found a way of freeing the administration of the island dependencies from some limitations that had hitherto applied in the government of territories.[2]

The pages that follow describing the organization and operation of our system of government, federal and state, are in a large part but a commentary on the ways in which the Constitution — "the solemn determination of the people enacting a fundamental law" — has been transformed in the hands of those who from generation to generation have exercised political power. Over and over the plain record of political practices and official operations will bear eloquent testimony to the truth of the measured summary by Judge Cooley so often quoted: "We may think that we have the Constitution all before us; but for practical purposes the Constitution is that which the government in its several departments and the people in the performance of their duties as citizens, recognize and respect as such; and nothing else is. . . . Cervantes says: 'Every one is the son of his own works.' This is more emphatically true of an instrument of government than it can possibly be of a natural person. What it takes to itself, though at first unwarrantable, helps to make it over into a new instrument of government, and it represents at last the acts done under it."

[1] See below, chap. xxii.

[2] *Readings*, p. 375.

CHAPTER V

THE EVOLUTION OF STATE CONSTITUTIONS

THE facility with which our political system may be divided into the state and federal branches naturally leads to the separation of them for the purpose of convenient treatment; but the student should never lose sight of the fact that, after all, our political system is a unit because the operations of both branches interlock at many points, and the developments of each affect the letter and spirit of the other. The framers of the federal Constitution, for example, did not contemplate the adoption of general manhood suffrage or the direct election of the President, and yet state action and party practice have accomplished this. It surely was not the intention of the states which ratified the Constitution that the outcome was to be the reduction of each commonwealth to the position of little more than a local government through the increase of federal power; and yet such has been the case. It was not dreamed that national politics would overshadow state politics; but the growth of huge national party organizations in connection with the operations of the federal government has made the state a tight-working cog in a national mechanism. A complete survey of American constitutional evolution must, therefore, take into account the tendencies in the evolution of state institutions.

An examination of the principal features of the early state constitutions reveals certain striking characteristics.[1] They show, in the first place, an unlimited faith in the legislature, because they contain practically no limitations on the powers and procedure of that body. At the same time, they reveal a distrust of the executive by providing in many instances that the governor shall be elected by the legislature, and under all circumstances restricted to the exercise of a very limited authority.

[1] The constitutions of the American states are to be found in Thorpe, *The Federal and State Constitutions*, published by the federal government in 1909.

Following colonial precedents, they impose property qualifications, and in many cases religious tests as well, upon voters and office-holders. They, furthermore, provide that the state executive officers, and especially the judges, shall be appointed, not elected in the modern fashion. Finally, the eighteenth-century constitutions are brief and simple in contrast to the bulky and complex documents of our time. The fundamental law of New Jersey adopted in 1776 fills only about five printed pages. The constitution of New York, drafted in 1777, including a reprint of the Declaration of Independence, covers less than sixteen printed pages, while the last constitution of New York, drafted in 1894, spreads over forty-three pages. The Virginia constitution of 1776, leaving out of account some passages from the Declaration of Independence, fills only about five and a half printed pages; the last Virginia constitution (1902) is ten times as large. The constitution-makers of Louisiana in 1898 required forty-five thousand words to write the fundamental law of that commonwealth; and the constitution of Oklahoma, admitted to the Union in 1907, would fill about one hundred and fifty printed pages of the style of this volume.

The Rise of Political Democracy

At the outset of an inquiry into the first state constitutions, one is struck by the fact that the Fathers, notwithstanding the theoretical assertion of equality in the Declaration of Independence, did not believe that the right to vote and hold office should be freely given to all men regardless of the amount of property they held or the religious opinions they entertained.[1] In nearly every state, the suffrage was limited, by the constitution or laws, to property-owners, generally freeholders or taxpayers, and in some of them religious tests were imposed in addition. In New York the constitution of 1777, adopted "in the name and by the authority of the good people" of the state, provided that "every male inhabitant of full age, who shall have personally resided within one of the counties of this state for six months immediately preceding the day of election, shall at such election be entitled to vote for representatives of the said county in assembly; if, during the time aforesaid, he shall

[1] *Readings*, p. 72.

have been a freeholder, possessing a freehold of the value of twenty pounds within the said county or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to this state." [1] No one could vote for state senator or governor in New York who did not possess a freehold of the value of £100, over and above all debts charged thereon. "The qualifications of electors," runs the South Carolina constitution of 1778, "shall be that every free white man, and no other person, who acknowledges the being of God and believes in a future state of rewards and punishments, and who has attained to the age of one and twenty years and has been a resident and inhabitant in this state for the space of one whole year . . . and hath a freehold of at least fifty acres of land or a town lot, . . . or hath paid a tax the preceding year or was taxable the present year . . . in a sum equal to the tax on fifty acres of land to the support of this government shall be deemed a person qualified to vote for, and shall be capable of electing, a representative or representatives to serve as a member or members in the senate and house of representatives." [2]

Fearing that the interests of wealthier classes could not be sufficiently safeguarded by the restrictions placed on voters, the original constitution-makers imposed still higher qualifications on representatives and senators. According to the terms of the New Hampshire constitution of 1784, every representative had to be a Protestant possessed of a freehold worth at least £100; the same religious test was placed on a senator, and the value of his freehold was fixed at £200. Only Protestants

[1] All "freemen" of New York City and Albany could vote. See above, p 8.

[2] Property qualifications on voters for members of the lower house of the state legislature under the early state constitutions: New Hampshire (1784), taxpayer; Massachusetts (1780), freehold yielding £3 per annum or personalty worth £60; New York as in text above; New Jersey (1776), estate worth £50; Pennsylvania (1776), taxpayer; Maryland (1776), freehold of 50 acres or property worth £30; Virginia (1776), continued the colonial suffrage; North Carolina (1776), fifty acres freehold to vote for senators, and taxpayer to vote for members of the lower house; South Carolina (1778), fifty acres freehold, town lot, or payment of taxes; Georgia (1798), taxpayer. Dr. Thorpe estimates that there were about one hundred and fifty thousand voters in a population of five millions, whereas under the suffrage prevailing to-day there would have been not less than seven hundred thousand or more than one million voters. *Constitutional History of the American People*, Vol. I, p. 97.

worth £500 in real and personal property could be assemblymen in New Jersey under the fundamental law of 1776, and whoever aspired to the place of senator had to have £500 more. In Delaware (1776), representatives had to be freeholders believing in the Trinity and the inspiration of the Scriptures. All except Protestants possessing two hundred and fifty acres of land or £250 in personal property were excluded from the Georgia legislature under the constitution of 1777; and in Pennsylvania only taxpayers acknowledging the being of God and believing in a future state of rewards and punishments could enter the legislature.

As the dignity and responsibility of office in the early state governments increased, the property qualifications generally mounted upwards. The office of governor in Massachusetts and North Carolina was reserved to the possessors of freeholds worth £1000. "No person," says the Maryland Constitution of 1776, "unless above twenty-five years of age, a resident of this state above five years next preceding the election, and having in the state real and personal property above the value of £5000, current money (£1000 whereof, at least, to be freehold estate), shall be eligible as governor." The law-makers of South Carolina, in 1778, swept away the comparatively slight qualifications imposed on the governor two years before, and declared that the governor, lieutenant-governor, and members of the privy council must have "a settled plantation or freehold in their and each of their own right of the value of at least ten thousand pounds currency, clear of debt." In Massachusetts and Maryland, the highest executive office was closed to all except Christians, and in New Hampshire, New Jersey, North Carolina, and South Carolina to all except Protestants.[1]

[1] Property qualifications of governors under the early state constitutions: New Hampshire (1784), £500, one-half freehold; Massachusetts (1780), £1000 freehold; New York (1777), freehold; Maryland (1776), £5000, at least £1000 of which is freehold; North Carolina (1776), £1000 freehold; South Carolina (1778), £10,000 freehold; Georgia (1789), 500 acres freehold, or £1000 other property. Property qualifications of members of state senates under the early constitutions: New Hampshire (1784), £200 freehold; Massachusetts, £300 freehold or £600 personalty; New York (1777), freeholder; New Jersey (1776), £1000; Delaware (1792), 200 acres freehold or £1000 real and personal property; Maryland, £1000 real and personal property; Virginia (1776), freeholder; North Carolina (1776), 300 acres in fee;

From the opening of the nineteenth century to the Civil War, there was throughout almost all the states a tendency toward the abolition of these property qualifications and religious tests for voters and office-holders, although free negroes were not generally regarded as coming within the new democratic dispensation. This movement toward a direct male suffrage was the result of three main factors: (1) the growth of the mercantile classes, who were excluded in large numbers wherever the freehold qualification was imposed;[1] (2) the migration into the West, where, owing to the fact that every one was fairly well off so far as the rough necessities of life were concerned, radical notions about the equality of all white men, at least, were ardently championed; and (3) the rise of the large urban populations where the agitation of democratic enthusiasts met a quick response.

If we take up the state constitutions at present in force, we find that, with a very few exceptions, all the property qualifications and religious tests have disappeared, and that the only persons now generally excluded are women, lunatics, paupers, offenders against election laws, and persons convicted of serious crimes.[2] Pennsylvania requires her voters to be contributors in some amount to state or county taxes; Louisiana and South Carolina permit persons owning $300 worth of property to vote, but provide alternatives to this qualification. Voters at elections

South Carolina (1778), £2000 freehold; Georgia (1789), 250 acres freehold or property worth £250. The following were the qualifications of members of the lower branch of the state legislature as prescribed by the early constitutions: New Hampshire (1784), two years' residence, estate of £100, one-half freehold in town of residence, and adherence to Protestant religion; Vermont (1786), two years' residence, belief in one God and the inspiration of the Scriptures, Protestant religion; Massachusetts (1780), one year's residence, freehold of £100 or other estate of £200, Christian religion; New Jersey, one year's residence, £500 real and personal estate, Protestant religion; Pennsylvania (1776), two years' residence, taxpayer, Protestant; Delaware (1776), freeholder and believer in the Trinity and inspiration of the Scriptures; Maryland (1776), one year's residence, £500 real and personal property, Christian religion; Virginia (1776), freeholders; North Carolina (1776), one year's residence, 100 acres for life or in fee, Protestant; South Carolina (1790), three years' residence, free white, owning freehold of 500 acres and ten negroes or real estate of £150 value clear of debt; Georgia (1777), one year's residence, owner of 250 acres of land or £250 in property, Protestant. (Based on Thorpe's valuable tables. *Constitutional History of the American People*, Vol. I, pp. 68 ff.)

[1] *Readings*, p. 78.

[2] See below, chap. xxii.

for city councillors in Rhode Island are required to be taxpayers on property worth $134; and in a few states the suffrage, in local matters, especially involving expenses for improvements, is restricted to property-owners.

Property qualifications for office-holders have also practically disappeared; but some remnants of religious restrictions are to be found in the constitutions of at least eight states — Arkansas, Mississippi, Maryland, North Carolina, South Carolina, Texas, Pennsylvania, and Tennessee — all of which require belief in God as a qualification for office. The two states named last, Pennsylvania and Tennessee, require belief not only in God, but also in a future state of rewards and punishments. Nevertheless, broadly speaking, we may say that a century's political development has opened the electorate and public offices to all adult white males (and in fifteen states to women), regardless of their wealth or religious views. Its widening effect is revealed in the fact that, whereas about four per cent of the population possessed the right to vote just after the revolutionary period, about twenty per cent are now given the ballot.

The story of the process by which this more democratic political system has been secured is a long and complicated one, and it cannot be told here.[1] It has not been the result of any spontaneous and general action, but rather of many halting measures, tentative experiments, and minor modifications. Contrary to popular impressions, Americans were not all convinced by the early arguments in favor of universal manhood suffrage; even Lincoln, in 1836, would go no further than to admit "all whites to the right of suffrage who pay taxes or bear burdens (by no means excluding females)." The only measures relating to suffrage which are applicable to the whole country are the Fourteenth and Fifteenth amendments to the federal Constitu-

[1] "Eleven of the thirteen original states have abolished the tax and property tests, as follows: New Hampshire, the tax test in 1792; Georgia, the property test in 1789; Maryland, the property test in 1801 and 1809; Massachusetts, the property test in 1821; New York, the property test in 1821 and the tax test in 1826; Delaware, the property test in 1831; New Jersey, the property test in 1844; Connecticut, the property test in 1845; South Carolina, the property test in 1865; North Carolina, the property test in 1854 and 1868; Virginia, the property test in 1850 and the tax test established in 1864, in 1882." Lalor, *Cyclopædia of Political Science*, Vol. III pp. 825–826. Details cannot be given here. Consult Thorpe, *op. cit.*

tion. The latter amendment forbids states to deprive citizens of the vote on account of race, color, or previous condition of servitude. The former stipulates that whenever a state, for general purposes, denies the suffrage[1] to adult male citizens, its representation in the House of Representatives shall be reduced proportionately; but as this provision remains unenforced, its practical effect has not been to secure the results contemplated.[2]

In the original states, the property and religious qualifications have been removed by many separate measures. The process may be illustrated by some passages in the constitutional history of New York. The first constitution of that state, as we have seen, provided a property qualification for all voters (excepting the freemen of New York City and Albany), and for the governor and members of the legislature. The constitution of 1821 still required the senators and governor to be freeholders, but widened the suffrage by the following provision: "Every male citizen of the age of twenty-one years, who shall have been an inhabitant of this state one year preceding any election, and for the last six months a resident of the town or county where he may offer to vote; and shall have, within the year next preceding the election, paid a tax to the state or county, assessed upon his real or personal property; or shall by law be exempted from taxation; or being armed and equipped according to law, shall have performed within that year military duty in the militia of this state; or who shall be exempted from performing militia duty in consequence of being a fireman in any city, town, or village in this state; and also, every male citizen of the age of twenty-one years, who shall have been, for three years next preceding such election, an inhabitant of this state; and for the last year a resident in the town or county where he may offer his vote; and shall have been, within the last year, assessed to labor upon the public highways, and shall have performed the labor, or paid an equivalent therefor, according to law, shall be entitled to vote in the town or ward where he actually resides, and not elsewhere, for all officers that now are, or hereafter may be, elective by the people; but no man of color, unless he shall have been for three years a citizen of this state, and for one year

[1] Except for participation in rebellion or other crime.
[2] See below, chap. xxii.

next preceding any election, shall be seized and possessed of a freehold estate of the value of two hundred and fifty dollars, over and above all debts and incumbrances charged thereon, and shall have been actually rated, and paid a tax thereon, shall be entitled to vote at any such election. And no person of color shall be subject to direct taxation unless he shall be seized and possessed of such real estate as aforesaid."

Finally in an amendment adopted in 1826 popular suffrage was established by the provision that "every male citizen of the age of twenty-one years, who shall have been an inhabitant of this state one year, next preceding any election, and for the last six months a resident of the county where he may offer his vote, shall be entitled to vote . . . for all officers that now are or hereafter may be elective by the people." The special property qualifications imposed on "persons of color" by the constitution of 1821 were continued and were retained until after the Civil War.[1] By an amendment in 1845 it was added that "no property qualification shall be required to render a person eligible to, or capable of holding any public office or public trust in this state."

Even many of the western states began their history with a restricted suffrage. Ohio came into the Union in 1802, with a constitution limiting the suffrage to "all white males above the age of twenty-one years, having resided in the state one year next preceding the election, and who have paid or are charged with, a state or county tax." Senators and representatives likewise had to be state or county taxpayers. It was expressly declared, however, that "no religious test shall be required as a qualification to any office of trust or profit." These property qualifications were abolished by the new constitution of 1851; but negro suffrage was not granted until after the adoption of the Fourteenth Amendment. Illinois, admitted in 1818, imposed no religious tests, and admitted free white males to the ballot, but required her representatives and senators to be taxpayers, a restriction which was swept away in 1870.[2] Michigan came into the Union in 1835, without any religious or property qualifications for electors or officers. This example was soon followed by

[1] Removed by an amendment ratified in 1874.

[2] Indiana, admitted in 1816, had similar qualifications.

the other states; and, by the end of the first half of the nineteenth century, the United States was practically committed to the great experiment of white male suffrage.

The Civil War then raised the question of negro suffrage. At the beginning of the Republic the number of free negroes was so small that the problem did not attract serious attention, and some of the northern states did not exclude them from the suffrage. Soon, however, there appeared a decided feeling against granting them the ballot. Some of the states withdrew the privilege they had bestowed; and the newer western commonwealths quite uniformly decided in favor of restricting the franchise to white men.

Then came the great conflict, at the close of which the triumphant Republicans by military force compelled the acceptance of the Fourteenth and Fifteenth amendments, designed to sweep away all property qualifications and race distinctions.[1] As soon as the hold of the northern military authorities was loosened, the southern whites determined to deprive the negroes of the rights which had been newly forced upon them; and by a number of ingenious devices, hardly escaping the letter, and certainly not the spirit, of the federal Constitution, they succeeded in disfranchising perhaps nine-tenths, or more, of the colored voters. Among these devices are provisions requiring electors to read and write, imposing property qualifications, and admitting those who voted, or whose fathers or grandfathers were entitled to vote, in 1867.[2]

Agitation for woman suffrage began in the United States long before the Civil War. In 1867 the territory of Wyoming gave the ballot to women about the time an amendment to the federal Constitution establishing woman suffrage was introduced in Congress. After fifty years of agitation Congress, on June 4, 1919, submitted to the states for ratification a resolution that the vote should not be denied to any citizen on account of sex.

Decline in Representative Assemblies

With the growth of confidence in the capacity of the broad mass of the people to govern themselves through the exercise

[1] See below, chap. xxii; and *Readings*, pp. 393, 394.

[2] *Readings*, p. 401.

of the franchise, there came a remarkable decline of confidence in representative assemblies. This decline is written large in every state constitution framed since the first quarter of the nineteenth century. The reckless and corrupt manner in which legislatures bartered away charters, franchises, and special privileges to private corporations led our constitution-makers to provide long and detailed lists of matters on which the legislatures are absolutely forbidden to act.[1] To secure publicity and prevent sinister influences from working by secret methods, the newer constitutions contain provisions controlling legislative procedure.[2] Extravagance and recklessness in laying taxes and making appropriations have brought about a series of provisions placing limits upon the borrowing power of our state legislatures.[3] Constant interference with the local affairs of cities has been met by numerous devices designed to safeguard municipal autonomy.[4] In every state, except one, each legislative act must now be approved by the governor, and if it is vetoed it must be repassed, generally by an extraordinary majority, before it can become a law. Finally, the crowning act of distrust in the integrity and responsibility of the legislature has been manifested by the establishment, in many states, of the initiative and referendum, which gives to the voters the right to make laws without even the intervention of the legislature.[5]

With this growing distrust in representative assemblies has come a remarkable increase in the confidence displayed in executive authority. As a result of the bitter conflicts between colonial legislatures and royal governors, the early constitution-makers had come to distrust the executive and to fear its transformation into a monarchy through usurpations. So great was their apprehension at the outset, that they empowered the legislature even to choose the governor in all of the colonies except New York and Massachusetts, where he was elected by popular vote. His term of office was usually fixed at one year; in most cases he was even deprived of the veto power; and in the exercise of such authority as was given him he was often controlled by a council. In Pennsylvania, for example, the governor bore the more democratic title of president; he was elected by a joint ballot of the general assembly and the

[1] See below, chap. xxv, and *Readings*, pp. 84, 458. [2] *Readings*, p. 457.
[3] *Ibid.*, pp. 459 ff. [4] *Ibid.*, p. 512. [5] *Ibid*, pp. 413 ff.

council for a term of one year; he enjoyed no authority in summoning or dissolving the legislature; he was not granted the veto power; and he was controlled to a considerable extent by an elective council. In New York, where the governor was elected by the freeholders for a term of three years, his veto power was shared by a council of revision composed of the chancellor and judges of the supreme court; and his appointing power was held in check by a special council of senators chosen by the assembly.

This executive system was not long in operation before the distrust in the integrity and capacity of the legislature, noted above, led to a call for the increase of the governor's power. Pennsylvania, revising in 1790 the constitution framed in the year of Independence, vested the election of the governor in the citizens of the commonwealth, lengthened his term from one to three years, and gave him the veto power. New York, in 1821, abolished the councils of revision and appointment, that shared the governor's veto and appointing power. Virginia, in the revision of 1830, retained the method of electing the governor by the legislature, but at that time increased his term to three years. The new western states, Kentucky in 1792, Ohio in 1802, Indiana in 1816, Michigan in 1835, provided for popular election — examples which were followed by the neighboring commonwealths as they were gradually admitted to the Union. In 1788 only two states, New York and Massachusetts, gave the governor the veto power, and the former with limitations on its exercise; but in 1920 only one state, North Carolina, withheld it. More than twenty states have extended the term of office to four years; even Massachusetts and Rhode Island at last surrendered the early plan of annual elections. Moreover, the governor has now won a recognized place as political leader and assumes a large share of responsibility for the legislative as well as the executive policy of the state government.

The State Judiciary

Many radical changes have been made in the judicial system of our commonwealths.[1] The first state constitutions contained very few provisions with regard to the judiciary; they left the

[1] See below, chap. xxvi.

question of the organization of the courts and distribution of jurisdiction principally to the legislature. In the beginning of our history, the judges of the higher courts were universally appointed, and held their offices during good behavior. Most of our constitutions, however, now provide that judges shall be elected by popular vote, usually for short terms. Only a few states have retained the ancient system.

In some of the newer states, we find radical departures from the traditional Anglo-Saxon legal doctrines.[1] For example, in Oklahoma, prosecution by grand jury has been partially set aside in favor of prosecution by information; in county courts and courts not of record the petty jury is to consist, not of twelve, but of six men; and in civil cases and criminal cases involving crimes less than felony, unanimous verdict is not required, but three-fourths of the whole number of jurors may render a verdict. The ancient rule of law that a person is not required to give evidence tending to incriminate himself when testifying against any other person or corporation is abrogated in Oklahoma; and every person accused of violating or disobeying an injunction out of the presence or hearing of the court is entitled to trial by jury — the right of a hearing being guaranteed in all cases before the imposition of any penalty or punishment for contempt. In order to expedite judicial business, a few states have resorted to the drastic device of refusing to pay the supreme court justices until they have finally decided the cases before them; and Oklahoma provides that they must render an opinion in every case within six months after it has been submitted.

The Multiplication of Elective Offices

We began our political history with a small number of elective offices — a short ballot. Under the first constitution of New York (1777), the governor, the lieutenant-governor, and the members of the legislature were the only state officers elected by popular vote; all others were selected by the council of appointment, consisting of the governor and four senators chosen by the assembly. Even sheriffs, county judges, and other county officers were appointed in the same manner. The first constitution of Virginia vested the choice of the members of the legisla-

[1] *Readings*, pp. 87 ff.

ture in the voters; the governor and other state officers were elected by joint ballot of the legislature; the justices of the peace were appointed by the governor; the sheriffs and coroners were appointed by the respective courts. Under the Massachusetts constitution, at first the governor, the lieutenant-governor, and the members of the legislature were elected by popular vote; the leading state officers were chosen by the legislature, and the minor state officers and some local officers were appointed by the governor. This general plan was adopted in the western states also. The Ohio constitution of 1802 provided that only the governor and the legislature should be elected by the people, and that the other state officers should be chosen by joint ballot of both houses.

As indicated above, our institutions underwent a democratic revolution, or what purported to be a democratic revolution, during the first half of the nineteenth century. Property and religious tests were swept away; the suffrage was extended to nearly all white males; and a multitude of appointive offices were made elective. The whole process is illustrated in the constitutional evolution of New York. The constitutional revision of 1821, which aimed to abolish the council of appointment rather than to democratize the entire system, left the leading state officers, except the governor and the lieutenant-governor, appointive, and gave the appointing power to the legislature.[1] The great revolution came in 1846, when the governor, lieutenant-governor, secretary of state, comptroller, treasurer, attorney-general, state engineer and surveyor, canal commissioner, inspector of state prisons, the judges of the court of appeals and the justices of the supreme court, were made elective. A similar revolution occurred in all except a few states. New Jersey, for instance, escaped the tidal wave; the constitutional revision of 1844 left the judges and nearly all the state officers appointive.

It is commonly supposed that this great democratic upheaval was due to the leaven of French political philosophy working through Jeffersonian democracy. It is true that the notion of elective government was prominent in the philosophy of many French publicists; it was inherent in Rousseau's popular sovereignty, and found its way with a vengeance into the revolution-

[1] Except as to the judges.

ary constitution of 1791, until the poor clodhopper's head, as Napoleon put it, was addled with elections. It is likewise true that Jefferson included elective government among the cardinal principles of his system. "We believed," he said, "that man was a rational animal, endowed by nature with rights and with an innate sense of justice; and that he could be restrained from wrong and protected in right by moderate powers confided to persons of his own choice and held to their duties by dependence on his own will."[1] It is also true that the doctrine of an elective administration was propagated with great zeal by democratic enthusiasts during the sixty years that followed the establishment of our independence — propagated with such zeal that the people were converted and the notion was hardened into a political dogma.

Nevertheless there were potent forces besides "political principles" which precipitated this revolution. It requires no very deep research to discover that the appointive system worked badly in a large number of cases. A study of the debates of the state conventions which overthrew the older system yields abundant evidence in addition to that afforded by the controversial literature of the time. The early constitution-makers did not adopt a system that would fix responsibility. They were too much afraid of the governor, not merely on account of their republican ideas, but on account of their practical experience with the colonial governor, to intrust him with a considerable appointing power. In New York (1777), his appointive authority, as we have seen, was shared by a council of appointment, constructed by the following process. Once a year the assembly selected a senator from each of the four great districts into which the state was divided, and the four senators with the governor constituted the council; the governor was the presiding officer and had a casting vote only. In actual practice each member of the council claimed a nominating power equal to that of the governor, and until its abolition in 1821 this body was the centre of notorious partisan intrigues over patronage.

In denouncing the system in his message of 1820, Governor De Witt Clinton said: "The offices in the gift of this council are remunerated by salaries or fees to the amount of a million

[1] *Readings*, p. 93.

dollars annually. Combinations will be formed to obtain control of this enormous patronage. And they will attempt to influence, in the first place, the elections of the people, by dictating under the forms and discipline of party; secondly, the selection of the appointing power; and thirdly, the operations of that institution. . . . With this principle of irritation in our constitution, the hydra of faction will be in constant operation, endeavoring to make its way to power sometimes by open denunciation, at others by secret intrigue, and always by artful approaches. The responsibility of public officers is essential to the due performance of their trust, and is demanded by the properties of delegated power and the best interests of the community. The council as constituted is almost destitute of this essential attribute. The political tranquillity of the state demands a different arrangement of the appointing power.[1]" In short, it is difficult to imagine a system better calculated to introduce obscurity into the administration of a state.[2]

In the other commonwealths the appointing power was vested in the legislature or in the governor and senate, or distributed in such a way as to confuse responsibilities, entangle the legislature in administrative functions, and prevent the leading state offices from falling wholly under the control of any person or body of persons. The natural consequence seems to have been, in nearly every case, that the appointing power passed from the public authorities in which it was vested by law into the hands of organizations unknown to the law and only slightly or not at all subject to the pressure of public opinion. Appointment by the legislature on a large scale was a new experiment in American politics, for the power had not been generally exercised by colonial legislatures;[3] and it required very little experience to demonstrate that appointment by a numerous assembly was about the most successful way of destroying responsibility that could have been devised.

The recognition of this fact is apparent in the debates of the mid-century conventions that overthrew the appointive system. The experiment, tried under the New York constitution of 1821,

[1] Cited in Lincoln, *The Constitutional History of New York*, Vol. III, p. 615.

[2] See Gitterman, "The Council of Appointment in New York," in the Political Science Quarterly, Vol. VII, pp. 80 ff.

[3] Except in New England.

of allowing the legislature to select some officers and the governor and senate to select others did not work much better than the old council of appointment; for an extra-legal machine known as the "Albany regency" sprang up and controlled all appointments by secret operations in the legislature. Appointment to office by the legislative department, said Mr. Williams in the Ohio convention of 1850, "has tended to embitter party spirit and convert the general assembly into a mere political arena, and to some extent corrupt the pure fountain of legislation. . . . It is very certain that the principle which gives directly to the sovereign people the sole power of appointments to office is gaining ground." [1]

This view is confirmed by Rufus King in his work on Ohio. The legislature, he writes, "overloaded with the appointing power which had been taken away from the executive, became so much depraved in the traffic of offices, that in an assembly where there was a tie vote between the Democrats and Whigs, two Free Soilers held the balance of power and were permitted to choose a United States Senator in consideration of giving their votes for every other appointment to the party which aided them in this supreme exploit of jobbery." [2] The transformation of the legislature into a chamber of intrigue for office-hunters also occurred in Illinois.[3] In short, it seems to have happened in every state that tried the system.

This unhappy experience with a variety of appointing schemes, and certain prevalent theories of democracy brought our state constitution-makers gradually to the acceptance of the plan of popular election as the remedy for the evils which had sprung up and also as the goal of our political development. One after the other the old offices were made elective, and, as newer state offices of importance were created, the principle was applied as a matter of course. When it was suggested in a convention or legislature that the governor might appoint a state auditor or engineer or veterinarian, some advocate of fundamental democracy was sure to plead in tremulous tones the rights of the people. "I believe the voters of this commonwealth are competent to

[1] *Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio* (1850–51), Vol. I, p. 87.

[2] King, *Ohio*, p. 291.

[3] Davidson and Stuvé, *History of Illinois*, pp. 297 ff.

elect their treasurer," exclaimed Mr. Hanks in the Kentucky convention of 1890, when it was proposed to give the governor the power to appoint the officer; "I know full well that they are able to elect a governor. . . . I love our form of government . . . but while I love it, I loathe in the deepest recesses of my heart any effort whatever that will go in the direction of taking from the people of Kentucky the right to choose their own officers." [1]

An attempt to centralize responsibility in the office of governor was made by the Constitutional Convention of New York in 1915. Nearly all the branches of administration were to be combined in a few departments each headed by an officer appointed by the governor. The proposal was defeated by the voters at the polls. Massachusetts, however, took a long step in the direction of enlarged executive authority in constitutional amendments ratified in 1918.

In close connection with the doctrine that all public officers should be elected is the notion of "rotation in office," [2] which assumed such a large place in the political philosophy of Jacksonian democracy that it may best be described in Jackson's own words: "There are, perhaps, few men who can for any length of time enjoy office and power without being more or less under the influence of feelings unfavorable to the faithful discharge of their public duties. . . . Corruption in some and in others a perversion of correct feelings and principles divert government from its legitimate ends and make it an engine for the support of the few at the expense of the many. The duties of all public officers are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance; and I can not but believe that more is lost by the long continuance of men in office than is generally to be gained from their experience." [3]

Miscellaneous Matters [4]

In addition to these significant changes in the structure of American commonwealth government, as it was conceived in

[1] *Debates in the Kentucky Constitutional Convention*, 1890, Vol. I, pp. 1419 ff.
[2] *Readings*, p. 81.
[3] Richardson, *Messages and Papers of the Presidents*, Vol. II, pp. 442–462
[4] See below, especially, chaps xxii–xxv; and *Readings*, pp. 87 ff.

early times, we find, in our newer constitutions, a large number of sections relating to matters which were either neglected in the eighteenth century or intrusted to the discretion of the legislature, or which have arisen during the nineteenth century. Indeed our state constitutions mainly reflect the principal legal adjustments which have accompanied the material development of our country and are, in fact, well-nigh meaningless to any one not acquainted with the course of our economic evolution during the nineteenth century. Our recent constitutions make elaborate provisions for the control of railway and other corporations; they contain sections in behalf of labor; they provide in more or less detail for popular education; they take into account the special legal problems created by the rise of the great cities. Several of them make special recognition of the changed position of women in modern society by abrogating the old English legal doctrines in accordance with which her personality was merged in that of her husband while her property passed into his possession or control. Several of our state constitutions expressly provide that women may acquire and possess property of all kinds separate and apart from their husbands; and specifically abolish all distinctions between men and women with regard to the right to acquire, enjoy, and dispose of property and make contracts in reference thereto. Some of the newer constitutions also contain special provisions in behalf of women employed in industries.[1]

[1] Dr. W. F. Dodd sums up in a scholarly review the recent tendencies in state constitutional developments as follows: "(1) The disappearance of the distinction in form of enactment between statutes and constitutional amendments in the states which have adopted the initiative and referendum. (2) The increase of popular control over state legislation through the spread of the initiative and referendum, and through the enactment of statutory matter by constitutional amendment. (3) The increase of popular control in towns and cities through the granting to cities of power to frame their own charters, and through restrictions placed upon state legislatures as to local and special legislation; and through the introduction of the local initiative, referendum, and recall. (4) The slight increase in the power of the governor over the state administration, and the great increase of the governor's power over legislation. (5) The continued diminution of the power of state legislatures, through the adoption of methods of popular legislation, through express prohibitions upon legislatures with reference to special and local legislation, and through the increased power granted to the governor over legislation. (6) The efforts to subject public service corporations to more adequate control." *Proceedings of the American Political Science Association*, 1908, pp. 149–164.

Development in the Process of Constitutional Amendment[1]

When the sovereignty of the British crown and parliament was thrown off, the Revolutionists naturally declared that the popular will was the basis of all government. The right of the people to alter or abolish, and to institute new forms of government on such principles and with such powers as might to them seem most likely to effect their safety and happiness was laid down in the Declaration of Independence. Notwithstanding this, it was a long time before the state constitution-makers came to see that, according to this great democratic theory, every fundamental law ought to provide for a simple mode of amendment through which, from time to time, the electorate might alter or reconstruct the system of government. A number of the first state constitutions made no provisions whatever for amendment, and nearly all of them were put into operation without being submitted to popular ratification. This was due to the confusion of the Revolutionary days during which the constitutions were drafted, to a failure to distinguish between constitutions and statutes, and to the generally prevailing notion that a convention composed of delegates chosen by the electorate had the sovereign power to frame new governments. And, as a matter of practice, amendments were made from time to time, and new constitutions were drafted, by conventions summoned on the mere call of the legislatures without any higher sanction. This seems to have been recognized as a regular method; for, with the exception of the Vermont constitution of 1793, none of the constitutions framed before the opening of the nineteenth century provided that amendments, whether made by the legislature or a special convention, should be submitted to popular vote.

It was therefore only by a gradual process that our constitution-makers arrived at anything like the complete and elaborate system of amendment to be found in the most carefully prepared fundamental laws of our day, such, for example, as that of New York. This process, according to Professor Garner, has four stages. In the closing decades of the eighteenth century it was the common practice to make no provision at all for amend-

[1] See article on Amendment Systems by Professor J. W. Garner, American Political Science Review, February, 1907.

ments; (1) during the first half of the nineteenth century the method of amendment by convention was fairly well developed; (2) immediately preceding and following the Civil War the more simple method of alteration through a legislative enactment ratified by the voters was widely adopted; (3) during the three or four decades immediately following the Civil War the system of double amendment through periodic conventions and legislative enactments popularly ratified was worked out; and (4) within the last decade has come the still more complete and democratic system of amendment through the popular initiative and referendum.

The effect of this simplification in the amending process is apparent at a glance. Any one who examines the recent history of state constitutions will be struck by the frequency with which they are being revised and amended. The southern states have made the most frequent constitutional changes, but this has been largely due to circumstances connected with the Civil War. Alabama has had five constitutions, Georgia six, Louisiana seven, Maryland four, South Carolina six, and Virginia six.

Within twenty years no less than seven states — New York (1894), South Carolina (1895), Delaware (1897), Louisiana (1898), Alabama (1901), Virginia (1902), and Michigan (1908) — drafted new constitutions.[1] Furthermore, owing to the great detail in which our constitutions are now being elaborated, frequent amendments, usually of minor importance, are required. New York, between 1894 and 1914, adopted more than twenty-five amendments; and there is scarcely an election at which some alteration in the constitution is not submitted to the voters for ratification.

In 1912, Ohio held a fourth constitutional convention which submitted to the voters forty-one amendments "radically altering the existing instrument and practically establishing a new constitution." Thirty-three of the propositions were approved and eight rejected. In 1915, the state of New York drafted a new instrument making more drastic changes in the structure of state government than had ever been proposed in any state, including a highly centralized administrative system and an executive budget. It was rejected at the polls by an overwhelm-

[1] See *American Year Book* for an annual review of amendments to state constitutions.

ing vote. The Arkansas convention, assembled in December, 1917, submitted to the voters (1918) a new instrument, only to have it defeated at the polls. In June, 1917, Massachusetts witnessed the meeting of the fourth convention in the history of the state. In the autumn of that year a few amendments were ready for the voters and after prolonged sessions the convention submitted, in 1919, another list of amendments. The new provisions approved by the electorate brought about some rather radical changes in the Constitution of 1780, but an attempt was made to preserve, as far as possible, the language of that venerable instrument. Among the more important changes were: (1) prohibition of public aid to sectarian schools, (2) the initiative and referendum, (3) extension of the term of governor, (4) consolidation of the state offices, boards, and commissions, (5) and an executive budget system. In 1917 the Indiana legislature called a convention to revise the constitution, but the measure was set aside by the supreme court of the state on the ground that it had not been submitted to a vote of the people. In 1920 constitutional conventions assembled in Illinois and Nebraska, and proposals for a thoroughgoing reconstruction of the machinery of state government were taken under consideration.

A survey of our state history during the last quarter of a century undoubtedly reveals that our commonwealth constitutions are becoming more and more cumbersome and complex; and affords but little consolation to those who believe, with President Woodrow Wilson, that "the prompter we grow in applying with unhesitating courage of conviction all thoroughly tested or well-considered expedients necessary to make self-government among us a straightforward thing of simple method, single, unstinted power, and clear responsibility, the nearer we approach to the sound sense and practical genius of the great and honorable statesmen of 1787."

CHAPTER VI

THE EVOLUTION OF POLITICAL ISSUES IN THE UNITED STATES

The Place of Parties in the Process of Government.[1]

A CITIZEN might know all the written provisions of the federal and state constitutions, and the names of all the legislators and public officers, their terms, qualifications, emoluments, and statutory duties; he might be familiar with the decisions of the Supreme Court on every important point of constitutional law and with the organization of every department of the federal and state governments — in short, he might be intimately acquainted with law and juristic theory — and yet not understand the government as a going concern; because the government is not a group of rules but a group of persons engaged in various public occupations, one portion devoting its attention principally to making laws and another to carrying them into execution. Blackstone, therefore, had a very precise notion of the true nature of a government when he treated it as an aggregate of persons having rights and duties. However much we may talk of a "government of laws and not of men," it remains a fact that every act of the government is an act of a certain person or of certain groups of persons; and in official, as in private life, men do not always observe formal rules. They make agreements among themselves, they have many temporary and permanent understandings, and they hold innumerable conferences of every sort which are unknown to law but which are nevertheless indispensable in carrying on the operations of government. It is apparent, therefore, that government is not a mechanical thing, but when properly understood is simply an association of men engaged in doing certain things which we separate from the ordinary occupations of life and call "political."

[1] On this important topic, see Bentley, *The Process of Government.*

The particular individuals who shall be selected to constitute the governing group; the organization of the various subdivisions of the government; and the character of the laws the group in power shall make and enforce are matters which very deeply concern social welfare and impinge upon many private interests. Inevitably those who possess the power of determining these matters, which affect some favorably and others unfavorably, become divided into groups. Thus political parties originate; and inasmuch as the necessity of choosing officers and deciding upon policies of government are constantly recurring, each political party tends to become a permanent organization, with officers and privates standing beside and mingling with the group engaged in the governing process. It sometimes happens that the leader of a party in a city is more powerful than the mayor;[1] that the chairman of a state committee controls the governor; and that the chairman of the national committee may dictate terms to the President of the United States.[2] Furthermore, it often happens that the officials of the government are at the same time officials in some party organization; and, generally speaking, the party leaders are men who hold, or have held, or hope to hold political positions.

The relations between the group of men actually engaged in governing and the group of men constituting the party in power are so intimate and so subtle that no one can draw the line separating them, and say, "Here the government begins and the party ends." Even the chief executive of the United States is coming to be regarded as the greatest leader of his party,[3] and on this account recent Presidents have felt justified in taking a prominent place in party councils, and bringing their personal influence to bear in the formulation of party policies. Moreover, each party in Congress has its congressional committee charged with the function of propagating the principles of the party, advancing its interests at each congressional election, and securing the control of the federal legislature.

It is not only in elections that there is an intimate relation between government and party. Under ordinary circumstances, the President, in performing his constitutional duties, is bound

[1] See *Readings*, p. 125. [2] *Ibid.*, p. 169.
[3] For Mr. Taft's view, see below, chap. x; *Readings*, p. 265.

to consult the interests of his party, by taking the advice and counsel of its leaders; and this influence of party runs throughout the entire government. Theoretically, the President nominates officials with the advice and consent of the Senate; but in actual practice the President does not have a free hand in making nominations. Quite to the contrary; the nominations for most of the offices are made in close consultation with the members of the President's party in the Senate or in the House of Representatives. Theoretically, the President should formally consult with the Senate on the making of treaties; practically many an important treaty is settled at a dinner-table, where the influential party members in the Senate are present. Theoretically, laws are made by the Senate and House of Representatives; practically they are made by the party in power under the direction of the party leaders, and in the actual process of law-making there are innumerable joint and separate party caucuses.

To many persons this intimate relation between government and party seems undesirable, and no doubt many evils arise from the fact. Nevertheless, inasmuch as a government is not a mechanical thing to be operated with scientific precision, but a human institution, with a policy to execute and duties to perform, parties are inevitable — as inevitable as the separate groups and interests from which spring different opinions on the functions and policies of the government.

Moreover, three features in the structure of our federal system make party government and strong party organization indispensable if the will of the voters is to be realized.[1] In the first place, the legislative powers are divided between the federal Congress and the state legislatures, so that if a party has a policy that requires federal and state legislation it must be in power in both governments. For example, if a party wants an interstate commerce law, it must go to Washington; if it wants a supplementary law regulating commerce within the state in a manner consistent with the federal law, it must go to the state legislatures. If a party, therefore, has a systematic and rational policy with regard to the important questions of our day relative to railway, insurance, and trust regulation, it must embrace

[1] This is the thesis of Professor Goodnow's *Politics and Administration.*

within its plans federal and state laws; and in order to realize completely its policy, it should be strong enough to control state and national legislatures.

In the second place, the theory of the separation of executive and legislative powers serves to strengthen the political party; for popular government, as is now generally recognized, requires the coördination of the executive and the legislature.[1] To take a homely example from daily life: no business man who has made up his mind that a certain thing should be done would think for a moment of choosing to do his will an agent who was bitterly opposed to the plan; and yet this is exactly what may happen and does often happen in American government. It frequently occurs that the legislature of a state is Republican and the governor Democratic; that is, men are chosen to make laws which are to be enforced by an executive whose party may be in violent opposition to those very laws. In order, therefore, for popular government actually to exist, it is necessary that those who have decided upon a certain public policy should control not only the makers of law, but also the principal officials charged with its execution. In England, this fact is frankly recognized in the unwritten constitution; for the executive branch, that is, the Cabinet composed of the heads of departments, is selected from the party which has a majority in the House of Commons. The makers of the law and those charged with its execution are one. In the United States, however, this coördination of the legislature and the executive must be secured *outside* of the written law; and it is the party system which makes it possible. It is through the party that there are nominated for the legislature and executive positions, candidates who are in a fair degree of harmony with one another, and who, if elected, can work consistently together to carry out the will of the voters expressed at the ballot-box.

In the third place, the American system of electing so many public officers both facilitates and renders necessary strong party organization. In almost every election there are so many different officials to be selected, that even the most intelligent citizen cannot be expected to make a wise choice. Accordingly, he is compelled to depend more or less upon the judgment of his party;

[1] Goodnow, *ibid.*, p. 24.

and in actual practice he often follows the advice of President Harrison: "Let us all consider the history and declarations of the great parties, and thoughtfully conclude which is more likely to promote the general interests of our people." Having selected his party, the citizen then relies largely upon the integrity and the wisdom of its leaders in the selection of nominees for various offices.[1]

Therefore, the close relations existing between the government and the majority party; the functions of the party as an instrument for expressing and enforcing public will; the influence of the party on the theory and practice of our government; and finally the position of the party as the organizing and directing force in American political life — these factors make the study of party politics, in its origin and development, quite as important as the study of the framework of the government.

Origin of Parties in the United States

On no matter were the framers of the federal Constitution in more complete harmony than on the undesirability of party politics. It must be remembered that they worked at a time when the modern democratic idea of an unlimited and responsible government was not recognized. The government of England, which was their principal model, had not reached its present form, in which the king reigns but does not rule, while the majority in the House of Commons controls all the executive officers through whom the actual administration is carried on. England's government in the eighteenth century had passed out of the absolute stage in which the king made laws, appointed ministers, declared war, and conducted foreign affairs at his own pleasure; but it had not passed into that modern stage in which the will of the electors, expressed through the party, dominates the whole machinery of government.[2] When our forefathers were busy framing the federal Constitution, the English government was at a halfway point between these two stages. Party government was not then frankly recognized; it was not finally settled that the king must select his ministers from the party in power; and the democratic doctrine that the

[1] On this point, see below, chaps. xxiii and xxx.

[2] See J. Allen Smith's suggestive work, *The Spirit of American Government.*

will of the electors must control the legislature and the executive was not yet accepted. Nevertheless, the possibility of democratic government was known and feared, and in framing our federal Constitution the members of the Convention, as we have seen, had constantly in mind plans to break the force of majority rule.

The Fathers not only sought to check the growth of party control by structural devices in the government. After the new system had gone into effect, they found themselves in the possession of the offices, and they naturally deprecated opposition, which they attributed to "the factional spirit of party." Washington, in his farewell address, strongly admonished his countrymen against cherishing this partisan feeling. "There is an opinion," he said, "that parties in free countries are useful checks upon the administration of the government, and serve to keep alive the spirit of liberty. This, within certain limits, is probably true, and in governments of a monarchical class patriotism may look with indulgence, if not with favor, on the spirit of party. But in those of a popular character, in governments purely elective, it is a spirit not to be encouraged."

At its very inauguration, the new federal government passed largely into the hands of that powerful and conservative group of men who had been most instrumental in framing or ratifying the Constitution. Washington, the president of the Philadelphia convention, became the first President of the United States; Ellsworth, W. S. Johnson, Langdon, Paterson, Robert Morris, Bassett, and Read were among the Senators in the new Congress; Madison, Gilman, Roger Sherman, Carroll, and Elbridge Gerry were in the House of Representatives. Hamilton, who had perhaps done more than any other man to bring about the establishment of the new system, was given the important post of Secretary of the Treasury; Randolph from Virginia was made Attorney-General; John Jay of New York, John Rutledge of South Carolina, William Cushing of Massachusetts, Robert H. Harrison of Maryland, James Wilson of Pennsylvania, and John Blair of Virginia, constituted the first Supreme Court.

The new government was not in operation very long before its policies began to arouse antagonism. Under the direction of Hamilton, the administration took firm and decided measures toward establishing the credit of the United States on a sound

basis. They made provision for the payment of every penny of the national debt and the accrued interest at full value, and, in spite of great opposition, they assumed the Revolutionary obligations incurred by the states. To carry out this policy, they established a United States Bank, notwithstanding the constitutional objections urged against it by Jefferson and his friends.[1] It was Hamilton's avowed policy to gain for the new government the support of the capitalists by linking their interests with its fate.

While providing revenues they frankly used the taxing power, at the very beginning, to protect American manufacturers against European competition. When the customs duties failed to bring in sufficient returns, it became necessary to impose some other form of taxes. By the act of 1791 Congress laid certain duties upon spirits, which stirred the distillers to rebellion; in 1794 a tax was laid on carriages, auction sales, and certain manufactures; and in 1798 a direct tax was laid on dwelling-houses and lots and on slaves between the ages of twelve and twenty. Moreover, the expenditures of the new government rose rapidly, with some fluctuations, from $3,097,000 in 1791 to $7,309,000 in 1795 and to $9,295,000 in 1799.[2]

These measures speedily aroused large and important classes to opposition. Agriculturists and persons with no commercial or financial interests and no government bonds were greatly excited over what appeared to them to be the transference of the government into the hands of powerful commercial and financial groups. They wanted the federal government to be as inexpensive as possible, and, therefore, they wished to restrain its operation within the narrowest limits under a strict interpretation of the Constitution. They wanted to buy their manufactured commodities as cheaply as possible from the more advanced European states where they could find also a profitable market for their own raw products. Finally, the direct taxes and the excise on whiskey were sharply resented by the taxpayers, and, as every one knows, the liquor duty brought about a brief armed opposition known as the "Whiskey Rebellion." Thus the policy of the new administration called forth a sharp antagonism based on economic interests.

[1] See *Readings*, pp. 62 and 237.
[2] Dewey, *Financial History of the United States*, p. 111.

The foreign policy of the new government added to the irritation started by the domestic policy. In the very spring in which Washington was inaugurated with such an acclaim in Wall Street, the Estates General met at Versailles and began the first scene in the great drama of the French Revolution; in 1791 a new constitution was put into effect and the power of the king was practically destroyed; the next year the first French republic was established; and in 1793 Louis XVI was executed, and war was declared on England. These events were watched with deep interest by American citizens. In the beginning, the effort of the French people to establish constitutional government was almost universally approved in the United States; but as the disorders of the revolution followed in rapid succession, conservative Americans began to draw back in horror.

The more radical elements of the population, however, fresh from their own triumph over George III, recalled with satisfaction the execution of Charles I by their own ancestors, and took advantage of the occasion to rejoice in the death of another ruler — the French monarch. The climax came in 1793, when France called on the United States to fulfil the terms of the treaty of 1778, in return for the assistance which had been given to the Revolutionists in their struggle with England. The radicals wanted to aid France, either openly or secretly, in her war on England, but Washington and his conservative supporters refused to be drawn into the European controversy. Thus the Americans were divided into contending groups. Burke's *Reflections on the French Revolution* and Paine's memorable reply, *The Rights of Man*, were read and debated with extraordinary interest and zeal.

Thus a long chain of circumstances led to the formation of two parties: the Federalists, and the opposition known in the beginning as the Anti-Federalists, but later as the Republicans or Democrats, the two terms being used synonymously and sometimes joined together. The Federalists were deeply angered by this antagonism to what they regarded as their patriotic efforts in behalf of the nation. Chief Justice Ellsworth, in a charge to a grand jury in Massachusetts, denounced "the French system mongers from the quintumvirate at Paris to the Vice-President [Jefferson], and the minority in Congress as the apostles of atheism, anarchy, bloodshed, and plunder." Hamil-

ton, Jay, and John Adams, realizing the seriousness of the opposition, began to organize their followers for political warfare; and in the second presidential election a real campaign was waged. It is true, Washington was unanimously reëlected, although not without criticism; but Adams, the Federalist candidate for Vice-President, secured only 77 of the 132 electoral votes, the other 55 going to the Anti-Federalist candidates. In the third presidential election the party alignment was complete. Jefferson, the leader of the Anti-Federalists, was roundly denounced as an atheist and leveller, while Adams, the Federalist candidate, was characterized by his opponents as "the monarchist." [1] So sharply drawn was the contest that Adams was chosen by the narrow plurality of only three electoral votes.

During Adams' administration a series of events thoroughly discredited the Federalist party. Adams was for a time popular, principally on account of his early attitude toward France for the mistreatment of our representatives, but that popularity was short-lived. The Republican newspapers heaped the most indiscriminate abuse upon the head of the President and the Federalists generally, and as a result Congress pushed through the Alien and Sedition Acts — the first authorizing the President to expel certain aliens who might be deemed dangerous to the safety and peace of the country, and the second making the publication of libels on Congress or the President a crime.

Under the Sedition Act many of the Anti-Federalists were sharply punished for what would seem to us trivial criticisms of the administration. For example, Callender, a friend of Jefferson, was convicted for saying, among other things, "Mr. Adams has only completed the scene of ignominy which Mr. Washington began." The Sedition Act, especially, seemed to be in flat contradiction to those amendments to the federal Constitution securing freedom of press and speech against federal interference, and undoubtedly it was unconstitutional. These laws called forth the famous Kentucky and Virginia Resolutions, and convinced even those moderately inclined towards democracy that Federalism meant an unwarranted extension of the powers of the federal government and perhaps the establish-

[1] For Jefferson's view of the difference between the Federalists and Anti-Federalists, see *Readings*, p. 92.

ment of party tyranny. At all events, these laws marked the death knell of the Federalist party.

It is true that Adams, the Federalist candidate for the presidency in the election of 1800, made a respectable showing — polling 65 electoral votes against the 73 received by Jefferson; but in the next election the Federalists were completely humiliated, their candidate, Pinckney, receiving only 14 out of the 176 electoral votes. Even Massachusetts and New Hampshire, the strongholds of Federalism, went heavily for Jefferson. The Federalists, however, made a feint at resistance until 1816, in which year their candidate, Rufus King, received 34 out of 217 electoral votes; but after that presidential election they disappeared altogether as a national party.

It would be a mistake to suppose, nevertheless, that the triumph of the Jeffersonians meant an entire repudiation of the principles of the Federalists. Indeed, quite the contrary happened. In the purchase of the Louisiana territory the Anti-Federalists stretched the Constitution to such an extent that Hamilton's Bank Act seemed insignificant. Furthermore, in 1816, the second United States Bank was established, and when it came to the settlement of the revenue system after the war of 1812, the leaders of the Democratic-Republican party finally adopted a sweeping protective tariff on the broadest possible nationalist basis. Thus it may be said that, while the Anti-Federalists ruined the opposing party, they were compelled to adopt its more fundamental principles.[1]

The Rise of Western Democracy

During the period from 1816 to 1828 American politics took on an aspect of personal and factional dispute. Federalist organizations had disappeared, and the Republican party seemed to embrace in its ranks the entire electorate. Political feeling, however, ran high, but the leaders were unable to group the electors into two great contending parties. They searched about for principles upon which to reorganize the political fragments, but they were unable to agree upon any set of doctrines that would produce the desired effect.[2]

Meanwhile there were going on certain fundamental economic

[1] Burgess, *The Middle Period*, pp. 1 ff. [2] Shepard, *Van Buren*, p. 92.

changes, the significance of which was not appreciated by contemporary observers, but which were destined to give an entirely new direction to American political life. These great changes were connected with the conquest and settlement of the Great Northwest, and the transformation of slavery from a domestic to a capitalistic institution by the extension of cotton culture into the Southwest. The balance of power was being shifted from the seaboard states to the West, and within the eastern states industries were rising which were destined to overthrow the landed aristocracy. Kentucky was admitted to the Union in 1792, Tennessee in 1796, Ohio in 1802, Louisiana in 1812, Indiana in 1816, Illinois in 1818, Mississippi in 1817, Alabama in 1819 and Missouri in 1821.

In these western states there existed a type of economic society such as had never before appeared in the history of the world and never can exist again, at least on a large scale. They were settled by hardy and restless pioneers who crossed the mountains, cut down the forests, built their log cabins, and founded homes. In the possession of this world's goods they were, for the most part, substantially equal; it was easy to acquire land, and any thrifty and industrious pioneer with his family could readily secure the comforts of a rude but healthful and independent life. In the log cabins of these pioneers were developed political ideas fundamentally different from those entertained by the rich merchants of the East or the aristocratic landholders in their manors along the Hudson.

Here in the West there existed a substantial economic equality, and it seemed at last that the levelling theories of Jefferson were being realized on a large scale. Owing to the simple life which they lived, government was to them a simple thing; any one could hold the office of sheriff, county clerk, road supervisor, state auditor, or governor. As the duties of the offices were slight and easily understood, and the emoluments connected with them attractive, especially to men who earned their bread with the axe and plough, the western settlers seized with eagerness upon the doctrine of short terms and rotation in office.[1]

These western communities, moreover, needed capital to develop their latent resources, to complete highways and con-

[1] See above, p. 94.

struct canals, and to rear industries; and for this capital they were compelled to look principally to the accumulations of the East. This necessity made them dependent largely upon eastern financiers, and they determined if possible to rid themselves of this dependence by the establishment of state banks, issuing paper money in large quantities with but slight basis for redemption. It is easy to ridicule western theories as to fiat money, but when one appreciates the grinding necessities of the frontier life he can understand, even if he does not approve, its financial devices.

The industrial revolution in England and the invention of the cotton gin created an enormous demand for raw cotton, which brought about a revolution in the agricultural system of the South. In the place of the old plantations, where masters and slaves dwelled side by side from generation to generation, thus mitigating the bondage of slavery by a somewhat patriarchal relation, there came a new type of plantation, on which slaves bred in the older states, or snatched away from Africa, in spite of the law, were herded together and worked with less regard for human considerations than in older states. With the demand for cotton came the demand for more territory. The bonds of the old South were burst asunder, and an irresistible pressure for the extension of the soil available for cotton culture set in, and swept everything before it. The slave population increased rapidly; the lust for money seized the dominant class as it seized the mill-owners in England. Thus slavery, once condemned or merely condoned, became intrenched, and it thereupon inevitably drew to its defence the best intellectual strength of the South.

East, as well as West and South, a revolution was going on. The industries of New England and the middle states, which had been begun in colonial times and had been fostered under the protective tariff after Independence and especially after the War of 1812, began to take on a new life. Mechanics from England came in large numbers, bringing with them the designs of machines which had so recently wrought the revolution in English industry. In 1807, Fulton inaugurated steam navigation on the Hudson; and far and wide hamlets were transformed into manufacturing centres through the magic of steam. The tide of immigration from Europe steadily increased, and most immi-

grants found their homes in the growing cities of the East. In the twenty years from 1800 to 1820 the population of Boston almost doubled, while that of New York rose from 60,000 in 1800 to 123,700 in 1820. Owing to the property qualifications placed on the suffrage by the constitutions of the eastern states, most of these immigrants and the native workers in the factories were excluded from the right to vote; but before the first quarter of the nineteenth century had elapsed, the restrictions on the suffrage began to be relaxed.

Here were the changed social conditions which made the United States of 1825 as different from the United States of Washington's day as the England of Cobden and Bright was different from the England of Bolingbroke and Walpole. The landed, financial, and industrial interests of New England and the middle states had now aligned against them the diverse interests of the laboring classes, the frontiersmen of the West, and the slave-owning cotton producers. In 1828, there was found a standard-bearer who, curiously enough, seemed to represent all of these diverse elements as against the older ruling aristocracy of the East. This standard-bearer was Andrew Jackson, a resident of Tennessee, a bold frontiersman, immensely popular on account of his triumph over the English at New Orleans and his unqualified championship of what he called "the rights of the people." Triumphantly elected, and feeling behind him the irresistible pressure of popular support, he began an executive policy which seemed for a time to transfer the seat of government from the capitol to the White House. He adopted the most novel notions on the rights of the President under the Constitution;[1] he ousted the old office-holding aristocracy without regard to appearances and circumstances, and placed his friends and supporters in office; he destroyed the United States Bank, the stronghold of powerful financial interests, in spite of the opposition raised up against him in Congress; and when nullification appeared in South Carolina he issued a ringing proclamation which showed that he was a stanch defender of nationalism as against states' rights.

For a time it looked as if Jackson was destined to sweep everything before him, and his second election seemed to confirm him in his opinion that he was opposed only by malignant minority

[1] See *Readings*, p. 190.

factions. Nevertheless, the elements of opposition to Jackson's policy steadily gained in strength. The members of the old ruling aristocracy dreaded the dominance of a man whom they regarded as an ignorant and violent military chieftain backed by the vehement passions of the populace. The banking and financial interests of the East had every reason to fear that a calamity would inevitably follow the destruction of the United States Bank and the flooding of the country with paper money through the state banks; many southern Democrats, who sympathized with the nullification policy of South Carolina, turned against Jackson for his determined stand against the action of that state. Furthermore, there was a well-organized group of eastern manufacturers who wanted to extend the system of protective tariff beyond the point Jackson was willing to go. Naturally Jackson raised up against himself many disappointed office-seekers, as well as the old office-holders whom he turned out. There was also in the West a growing number who wanted to secure larger federal grants for internal improvements than he was willing to concede.[1]

These elements of opposition were brought together in the National Republican or Whig party, which numbered among its famous leaders J. Q. Adams, Webster, and Clay. It would be wrong, however, to attribute the rise of this new party wholly to Jackson's personal policy. Even before his advent to power, the political factions into which the nation seemed divided were beginning to segregate into two fairly distinct groups — one under the leadership of Adams and Clay and the other composed of the Jackson-Calhoun-Crawford groups.[2] The first of these two aggregations was inclined toward a broadly nationalist policy with regard to internal improvements and the protective tariff, and the second took the more particularist or states' rights view which would restrict the activities of the federal government to the narrowest limits.

Jackson's high-handed policy in destroying the Bank, and his fondness for "strong executive government," simply helped to consolidate more effectively certain of the nationalist elements into the National Republican party, which soon received the

[1] For Horace Greeley's description of the Whig party, see *Readings*, p. 94.
[2] Burgess, *Middle Period*, p. 146.

name "Whig" — a title, taken from English politics, which signified "opposition to high executive prerogative and approval of congressional control over the President." As the contest with Jackson widened, the term Whig gradually supplanted the official title National Republican.

This party lasted nominally from 1828 to 1852. It put forward Clay as its candidate in 1832, only to meet certain defeat; and it enjoyed only two brief triumphs. In 1840 it elected William Henry Harrison, a popular hero, without having made any declaration of principles at all; and after the second defeat of its candidate, Clay, in 1844, it again had recourse, at the succeeding election, to a military hero, General Taylor, and was victorious. The Whigs, finding it impossible to agree among themselves on the impending question of slavery, tried to evade the real issue by nominating, in 1852, another military man, General Scott; but his overwhelming defeat was an evidence that the doom of the party had come.

The Rise and Growth of the Republican Party

Great events were forcing a new alignment of parties. Though the abolitionists were few in number, they carried on such a vigorous agitation that the slavery question was forced to the front, in spite of the best efforts of the politicians to obscure it. The abolitionists, however, did not constitute a political party of any weight. The opponents of slavery organized a convention at Buffalo in 1843, and nominated James G. Birney as candidate for President on "the principles of 1776," but Birney polled only about 62,000 out of some 2,600,000 votes in the election of the following year. Four years later another anti-slavery convention, held at Buffalo, nominated Van Buren on a platform of opposition to slavery in the territories; but this party, known as the "Free Soil" party, only polled about 290,000 votes. In the campaign of 1852, the Free Soil party declared: "No more slave states, no slave territory, no nationalized slavery, and no national legislation for the extradition of slaves"; but its candidate, Hale of New Hampshire, received only 156,000 votes.

Events, as well as agitation, however, were making slavery the issue. The war with Mexico had added to the territory of

the United States a large domain comprising California, Utah, Nevada, Arizona, and portions of Colorado and New Mexico; and the organization of this territory became at once the burning issue. A heated debate in Congress culminated in the compromise of 1850: Utah and New Mexico were organized as territories with or without slavery as their future constitutions might prescribe, and the slave trade in the District of Columbia was abolished, the South receiving its full value in an act for the more efficient rendition of fugitive slaves. The enforcement of this last provision by federal officers in northern states brought slavery home to the people of northern cities and hamlets, and made it odious to thousands who had formerly been indifferent to it.

The climax came, however, with the Kansas-Nebraska act (1854) expressly repealing that provision of the Missouri Compromise which excluded slavery from the northern portion of the Louisiana purchase, and reopening a sore controversy which opponents of slavery in the territories had thought forever closed. On the very morning after the House of Representatives took up the Kansas-Nebraska bill, several members of that body held a meeting on the call of Israel Washburn, and agreed that the advance of the slave power could be checked only by the formation of a new party, to be known as the Republican party. This, however, cannot be called the origin of that party, for before the repeal of the Missouri Compromise a meeting had been held at Ripon, Wisconsin, and a resolution had been adopted to the effect that a new organization, to be called Republican, should be formed on the question of slavery extension, if the bill passed. Indeed, all throughout the North and East there were signs of the dissolution of the old parties and a general reorganization. Many newspapers, with the New York Tribune under Horace Greeley in the lead, were advocating a new party alignment, and in the spring and summer of 1854 meetings were held in Illinois, Maine, Vermont, Michigan, Iowa, Ohio, Indiana, Massachusetts, and New York at which the Kansas-Nebraska bill was roundly denounced. At length, on July 6, 1854, a state convention was held at Jackson, Michigan, and a full state ticket of Republican candidates was nominated. The congressional elections of 1854 revealed the strength of this movement,[1] for

[1] J. F. Rhodes, *History of the United States*, Vol. II, pp. 58–67.

in the new Congress there were 117 Representatives and 11 Senators in the Anti-Nebraska party.

This new Republican party held its first national convention at Philadelphia in June, 1856, on a call issued by a preliminary meeting assembled at Pittsburg in the preceding February. At this convention Delaware, Maryland, Virginia, and Kentucky were represented, as well as all the northern states and some territories. Frémont was nominated as the candidate on a platform which declared that it was the right and duty of Congress to prohibit in the territories those "relics of barbarism, polygamy and slavery." In the campaign which followed, Frémont polled 1,341,264 votes against 1,838,169 polled by Buchanan, and received in all 114 electoral votes as against 182 for his two opponents, Buchanan and Fillmore.

By this time the Democratic party had taken a pretty clear stand on the question of slavery.[1] It asserted that Congress had no control over the domestic institutions of the several states, and deprecated the agitation of the abolitionists; it announced its adherence to the compromise measure of 1850, and declared that it would resist all attempts at renewing the agitation of the slavery question in Congress or out of it. In the final contest of 1860, however, the Democrats split into two factions, one headed by Stephen A. Douglas, who hoped to solve the slavery question by allowing the people of each territory, on their admission to the Union as a state, to decide for themselves; and the other by John C. Breckinridge, who stood on a platform advocating the extreme southern view that Congress had no power to prevent slavery in the territories.[2]

During the four years which followed its first national convention, the Republican party steadily gained in strength. It found its most effective support among the northern farmers, who believed that slavery should be excluded from the great western territories, in order that homesteads might be erected there by free men; and, indeed, it has been called "The Homestead Party"

[1] For the Democratic platform of 1852, see *Readings*, p. 95.

[2] After the split of the Democratic party in 1860, a small group taking the name of the Constitutional Union party held a convention in Baltimore and nominated John Bell, of Tennessee, on a platform that begged the whole slavery question. Bell received 39 electoral votes.

by an eminent publicist.[1] To the homestead element were added the manufacturing interests of the East, which were clamoring for more protection against European competition.[2] The alliance of these two great forces made a formidable party — not an abolitionist party, but a homestead and protective tariff party, standing for the exclusion of slavery from the territories. This party held its second convention at Chicago in 1860, and nominated Abraham Lincoln of Illinois and Hannibal Hamlin of Maine. Owing to the dissensions in the ranks of the Democrats, it was able to carry the election by a popular vote of 1,866,452 against a total vote of 2,815,617 for the three opponents. Mr. Lincoln received 180 electoral votes, Breckinridge 72, Douglas 12, and Bell 39.

As the southern leaders had warned the North, the election of Mr. Lincoln precipitated the long-impending crisis. When the Civil War broke out many northern Democrats came to the support of the administration, but throughout the armed conflict a large number of them adopted an attitude of hostility toward the policy of the Republican administration and openly sympathized with the Confederate states.

The Republicans were therefore compelled to rally to their support every one who believed in a strong union policy, regardless of his previous political affiliations, and thus they found within their ranks disgruntled Whigs, Free Soilers, and unionist Democrats whose sole bond of connection was the common opposition to Secession. Under these circumstances, the Republican party was at the beginning a somewhat heterogeneous group. In 1864 it made its appeal to all who believed in "the unconditional maintenance of the Union, the supremacy of the Constitution, and the complete suppression of the existing rebellion with the cause thereof by vigorous war and all apt and efficient means." During that campaign, it assumed the name of "Unionist," and notwithstanding its appeal to many different elements, Lincoln only polled some 400,000 votes more than the Democratic candidate McClellan, not counting the soldiers' votes, which were of course largely for the Unionist candidate.[3] Even in the campaign of

[1] See article by Professor J. R. Commons, Political Science Quarterly September, 1909, on Horace Greeley and the Republican party.

[2] For the Republican platform of 1860, see *Readings*, p. 97.

[3] The actual figures are: Lincoln 2,213,655, McClellan 1,802,237, without the soldiers' vote.

1868, the party used the title "Union-Republican," and it was not until the next presidential election, in 1872, that the original title, "Republican," was definitely assumed.[1]

The Republican party emerged from the period of Reconstruction, during which the southern states were restored to their former position in the Union, as a reorganized party fortified by the devotion of an intense patriotism,[2] and by the economic support of the manufacturing interests which had flourished under the war tariffs and of the capitalists anxious to swing forward with the development of railways and new enterprises.[3] In possession of all of the important offices, controlling the federal legislature, executive, and judiciary, with the Democratic party prostrate and identified with treason, the Republicans had a control over the destinies of the country only equalled by that of the Democratic party during the period preceding the Civil War.

Wherever there is such tremendous power, vigilant self-seekers of every kind are sure to congregate, and during the years which followed the war, the ranks of the Republican party were permeated with mercenaries of every type — the spoilsmen hunting offices, railway promoters seeking land grants and financial aid from the government, manufacturers demanding more discrimination in the tariff legislation, and the great army of hangers-on who attached themselves to these leaders. The integrity of the party was further injured by the "carpet-baggers" in the South, who, in the name of the federal government and the Republican party, plundered the southern states and heaped upon them an enormous burden of debt.

Thus, those who plundered under the guise of patriotism helped to discredit sadly the great party which made the proud boast that it had preserved the Union and abolished slavery. Under these circumstances the Democratic party began to be rehabilitated. It had had a long and triumphant history prior to the

[1] The reconstruction of the Republican party during the Civil War is the subject of a very convincing paper read by Professor Dunning before the American Historical Association in 1909, as yet unpublished. I am indebted to Professor Dunning for the privilege of reading it in manuscript.

[2] See the patriotic appeal in the Republican platform of 1876, *Readings*, p. 101.

[3] For a first-hand study of the economic aspects of the period, see Dunning, *Reconstruction, Political and Economic* (American Nation Series).

Civil War; it had great traditions, and numbered on its roll some of the most distinguished men in the American history; and, furthermore, it must be remembered that in the election of 1860, when it went down in defeat, it had the support, if we combine both factions, of an overwhelming majority of the people of the United States. It is not surprising, therefore, that this party began to close up its shattered ranks in opposition to Republican rule. In the South the whites began to recover their old predominance; in the North and West the farmers began to protest against the high protective tariffs; here and there throughout the Union discontent with the railway and corporation policy of the Republican party began to appear; and the spoils system stirred to action a small but vigorous minority of "civil service reformers."[1]

As a result, the Democratic party, in 1884, was able to bring together an effective opposition and Mr. Cleveland was narrowly elected, principally by the support of the "mugwumps," who bolted the Republicans after the nomination of Mr. Blaine at the Chicago convention. This Democratic triumph was short-lived, however, for four years later, when Mr. Cleveland forced the tariff issue by his celebrated message of 1887, the Republicans were able to elect Benjamin Harrison by a slight majority. Taking advantage of their victory, the Republicans forced through the McKinley tariff bill, which was regarded by many members of the party as entirely too drastic, and in the succeeding election of 1892 Mr. Cleveland was again able to lead his party to victory.

The Economic Revolution since the Civil War

At this time, however, American politics may be said to have entered upon a new phase. Since the Civil War there has been an economic transformation more revolutionary in character than that which formed the basis of the political upheaval of Andrew Jackson's time. Small business concerns have grown to gigantic corporations capitalized at untold millions and controlling nation-wide industries. There have been built up colossal fortunes from which the total national debt of Washington's day could be paid many times over. The western lands, once the hope of the poor man of the East, have been practically all taken up. The

[1] For the spirit of the Democratic opposition, see *Readings*, p. 103.

vast timber and mineral resources of the nation have passed largely into private hands. Cities have grown by leaps and bounds, and millions of poor are crowded in our industrial centres. The village workshop, the old-fashioned woollen mill by the brookside, the handloom, the short railway line, the small individualist factory, have been conquered by mighty captains of industry, whose bold enterprises and remarkable genius for world-wide organizations are the wonder of our age. With this industrial revolution has come a working-class. It may be demonstrable that there are many gradations of fortune in modern life and that members of the working-class are constantly passing to other ranks, but this should not be allowed to obscure the fact that a permanent working-class, dependent almost entirely upon the sale of labor power, is the inevitable concomitant of the industrial revolution. In connection with our commercial enterprises the insular dependencies have been acquired, and the federal government drawn into the mesh of world politics. Surely the United States of our time is further away from Lincoln's day than his America was from the America of Washington.

The Minor Parties

The new conditions of American life have created new groups of interests, and have, therefore, forced steadily to the front new types of political doctrines. These groups of doctrines, so far as they propose radical changes, usually find their first exponents in minor parties; and as the respective issues come within the range of practical politics, they are presented to the country in the national campaigns of the two great parties. Accordingly it seems worth while to review briefly the minor parties since the Civil War, for, in spite of their apparent insignificance, they are by no means negligible factors in the American governing process. These parties fall readily into three groups: the temperance, the labor, and the agrarian parties.

1. About the middle of the nineteenth century there arose a temperance movement which carried several states for absolute prohibition. A reaction, however, speedily set in, and the temperance question was overshadowed by the great slavery issue. It was not until after the Civil War that the Prohibitionists entered national politics. They held their first national conven-

tion at Columbus, Ohio, on February 22, 1872, and nominated Mr. Black of Pennsylvania as their presidential candidate. In their platform they declared that the prohibition of the liquor traffic was the leading issue, but they also proposed certain currency reforms and the regulation of transportation and monopolies.[1] Indeed, from the very inception of the party, the Prohibitionists have been unable to ignore the other questions of the day; and from time to time they have declared in favor of various economic reforms as well as the prohibition of the liquor traffic. Nevertheless, they have been unable to muster any considerable strength, for they polled only about 254,000 votes in 1908.

2. Almost immediately after the Civil War labor entered American politics as a separate and independent element. In 1872 a party known as the "Labor Reformers" held a national convention in Columbus, Ohio, which was attended by representatives from seventeen different states. The party at that convention declared in favor of restricting the sale of public lands to bona fide homeseekers, Chinese exclusion, an eight-hour day in government employments, civil service reform, one term for each President, regulation of railway and telegraph rates, and the subjection of the military to civil authority.[2] For a time, the labor element seems to have been absorbed into the agrarian groups described below; but in 1888 a "Union Labor" party met in national convention at Cincinnati, and drafted a platform embodying the principal doctrines of the Labor Reformers and demanding, in addition, popular election of United States Senators.[3]

The labor forces appeared in an avowed socialist organization in the campaign of 1892, when the "Socialist Labor" party held its first convention in New York. This party has made its appeal almost exclusively to the working-class. It declared in its platform of 1908 that "man cannot exercise his right of life, liberty, and the pursuit of happiness without the ownership of the land and the tools with which to work. Deprived of these, his life, liberty, and fate fall into the hands of the class that owns these essentials for work and production." The radical appeal of

[1] Their candidate in that year polled 5608 votes.

[2] The candidate of the Labor Reformers in that year polled about 29,000 out of over 6,000,000 votes.

[3] The candidate of the Union Labor Party in 1888 polled 146,935 votes.

the Socialist Laborites to the working-class to unite against the property-owning class has met, however, with no considerable response; its candidate in 1896 polled only 36,373 votes, and in 1908 the number fell to about 15,000.

The extreme views of the Socialist Labor party led to the organization of another radical group taking the name of "Socialist" party, which held its first convention in 1900, and at the 1908 presidential election polled 448,453 votes—more than the combined vote of the other minor parties. Four years later its vote rose to almost a million, only to fall materially in the election of 1916. This party also makes its appeal especially to the working-class, but it does not demand the complete abolition of all private property in the means of production. From time to time it has declared in favor of graduated inheritance and income taxes; universal suffrage; the initiative and referendum; proportional representation and the right of recall; popular election of judges; employment of unemployed working men on large government undertakings; collective ownership of all industries in which competition has ceased to exist; extension of the public domain to include mineral resources, forests, and water power; compulsory government insurance for the working-class; and an extended labor code designed to raise the standard of life for the working people in every branch of industry. The opposition of the party to the war against Germany led to the withdrawal of many prominent leaders, and the conservatism of the party on other matters brought about a secession of radicals and communists in 1919.

3. There has been in American politics since the period of the Revolution a distinctly agrarian element, but it did not appear as a separate political party until after the Civil War. With the rapid decline in the prices of agricultural products which accompanied the general collapse of the inflated war prices, the farmers began to grow dissatisfied with their lot, and at length they came to believe that the railways, the corporations, and the financial policy of the federal government were principally responsible for the evils under which they labored. Working through the legislatures, especially in Illinois, Iowa, Wisconsin, and other western states, they attempted to secure relief by passing a number of laws regulating railway rates and warehousing.

The discontented farmers entered politics in 1876 as the Independent National or "Greenback" [1] party, and waged warfare especially on the Republicans, charging them with being responsible for the decline in prices because they had placed the monetary system on a gold basis and contracted the currency. In spite of the small vote polled by their candidate, Peter Cooper, of New York, the Greenbackers put forward a candidate in the next campaign, and even made a third attempt in 1884. In view of later developments, their platform of 1880 is interesting, for it included, among other things, free coinage of silver, advanced labor legislation, the establishment of a national bureau of labor, Chinese exclusion, a graduated income tax, and the regulation of interstate commerce.

Although it gained in votes at first, — from 81,737 in 1876 to 308,578 in 1880, — the Greenback party went to pieces completely after the campaign of 1884. Within a short time, however, the discontented agrarians formed a new association, known as the Farmers' Alliance, which, although it did not officially enter politics, was the precursor of the Populist party. This party drew together, in 1892, both agrarian and labor elements in a national convention, which met at Omaha and put forth a radical program, demanding government ownership of railways, telegraph and telephones, a graduated income tax, postal savings banks, and the free coinage of silver and gold at the legal ratio of 16 to 1.

On this radical platform the Populists went into the campaign of 1892, with James B. Weaver as presidential candidate, and polled more than a million votes, principally in the western and southern states, carrying Colorado, Idaho, Kansas, Nevada, and securing one electoral vote in North Dakota and another in Oregon. This unprecedented achievement by a minority party was partially due to fusion with the Democrats in some of the states, but beyond question the Populists had attained a numerical strength which made them a force to be reckoned with in American politics.[2]

[1] So-called on account of its advocacy of paper money.

[2] The Populist party, after its capture of the Democratic party in 1896, continued to maintain a separate organization, but it has steadily declined, its candidate in 1908 polling only about 30,000 votes.

The New Era in American Politics

This became apparent in the great free silver contest of 1896, when the Democratic party was captured by the Populist wing, and waged a campaign on a platform based largely upon Populist principles. In that year the sectional issues growing out of the Civil War and Reconstruction were thrust into the background by newer questions connected with finance, trusts, and labor organizations, that had been brought forward by the industrial revolution. The free coinage of silver, which Mr. Bryan made the leading issue, appealed particularly to the farmers with heavily mortgaged property and to debtors generally; but back of that issue was a deep-seated antagonism of small property owners, merchants, petty manufacturers, and a large portion of organized labor to the great financiers and the corporation interests.[1] Mr. Bryan marshalled in his ranks radicals of every school who were opposed to what they called government by a "plutocracy."

This shifting of political interest to the newer issues of capital, labor, and monopolies worked more or less disorganization in both of the old parties. Each of them developed a conservative and a radical wing. For a time, the Spanish War turned popular interest into a new field, but the diversion was only temporary, and within a short time the discontent of the West, which made itself felt particularly in the Democratic party in 1896, began to make inroads upon the apparent solidarity of Republican ranks. The accession of Mr. Roosevelt to the presidency on the death of Mr. McKinley in 1901 hastened the division in that party, for he aroused the distrust of the conservative groups and appealed to the sentiments that had fostered populism. In his messages and speeches he brought railway, trust, labor, and other social questions prominently into politics. He advocated income and inheritance taxes partly with a view to helping equalize fortunes; he recommended a stricter federal control of corporations; he attacked "malefactors of great wealth" with a vehemence never before exhibited by a President; and he advocated a few measures for the benefit of the working classes. He found a very large group of supporters in his own party and they insisted on

[1] *Readings*, p. 105.

his becoming a candidate for renomination in 1912 after it was apparent that Mr. Taft's sympathies were with the conservative elements. Failing to secure his nomination at the Republican convention in Chicago, Mr. Roosevelt's supporters "bolted," and formed a new party which took the name of Progressive.

In the campaign of 1912 the new social and economic questions growing out of the industrial revolution received a more extended consideration than ever before in the history of our parties. The important question of the trusts and monopolies received careful attention. The Republicans advocated a clearer definition of those acts of corporations which unduly restrained trade, opposed the restriction of business opportunities by combinations and monopolies, and favored a more definite statement of the rights of larger business undertakings so that "business success honorably achieved may not be converted into a crime." The Democrats demanded a more vigorous prosecution of the trusts with a view to breaking them up into smaller units in order to make competition easier for business men of a minor order. The Progressive party took the position that the great corporation was "an essential part of modern business," and to some extent both "inevitable and necessary"; and advocated the regulation of such great concerns by a national industrial commission. The Socialist party agreed with the Progressives in the belief that trusts were the inevitable outcome of industrial evolution, but they contended that regulation was futile and that public ownership could alone relieve the country from the domination of these gigantic accumulations of capital.

The most extensive programmes of labor reforms were, of course, put forward by the Progressive and Socialist parties, which favored such schemes as minimum or living wages, prohibition of child labor, special laws safeguarding the health and safety of laborers, and workmen's compensation. The former party looked upon these as reforms designed to save the present system, and the latter as mere concessions to be secured as preliminaries to the conquest of the government by the working class. The Republicans promised "in all possible ways to satisfy the just demand of the people for the study and solution of the complex and constantly changing problems of social welfare." The Democrats promised to exempt trade-unions from the provisions of the law which made them liable to penalties as com-

binations in restraint of trade, agreed to afford jury trial in injunction cases, and pledged the party to the establishment of a Department of Labor.

The campaign of 1916, carried on while the World War in Europe was raging, naturally took on the color of the times. The social question, which had emerged rather sharply four years before fell somewhat into the background. The protection of American rights, national preparedness, the disturbances in Mexico, the national marine, occupied the centre of interest. The Progressives held their convention in Chicago at the same time as the Republican convention and nominated Mr. Roosevelt, only to have him decline. The Republicans selected as their standard-bearer, Justice Charles E. Hughes, former governor of New York, and after the refusal of Mr. Roosevelt to accept the nomination, the Progressive national committee endorsed the Republican candidate. The Republicans favored maintaining "a straight and honest neutrality between the belligerents in Europe" and the protection of American rights. They roundly condemned the Democratic administration for its Mexican, European, Philippine, and legislative policies. The Democrats re-nominated President Wilson and based their appeal mainly on the record of achievement. They commended the "splendid diplomatic victories of our great President, who has preserved the vital interests of our government and its citizens and kept us out of war." The question of woman suffrage was warmly debated at both the Republican and Democratic conventions, and both refused to endorse the federal suffrage amendment. The Progressives declared that "a nation to survive must stand for the principles of social justice. We have no right to expect continued loyalty from an oppressed class." The Socialists condemned the war in Europe as "one of the natural fruits of the capitalist system of production." Mr. Wilson's victory at the polls reckoned in terms of popular vote was decided.[1]

[1] Stanwood, *History of the Presidency, 1897–1916*. See *Readings*, p. 107.

CHAPTER VII

THE DEVELOPMENT OF PARTY MACHINERY

The process by which political parties have built up their organizations from the primary to the national committee and extended their sway throughout the United States and its dependencies forms one of the most interesting studies in all the history of political institutions. Originating in a variety of voluntary practices, party machinery became more definite and more complete from generation to generation, until at length it became a veritable government without and within the legal government — with its own army of officials, its congresses or conventions, its rules and customs, and its methods for maintaining discipline in the ranks. Its enormous power was early recognized; but for a long time it was regarded as a purely private association in spite of its eminently public character; and accordingly it escaped all governmental control. It was not until the abuses of the parties became so notorious as to threaten the integrity of the commonwealth, that the policy of regulating them by statute was adopted. This policy, once accepted, has been steadily advanced, however, until in many states the political party has been frankly recognized by law and openly made a piece of the regular mechanism of government.[1]

Party machinery is not a fortuitous development, but is the direct result of the requirements of practical politics. The necessity of nominating candidates for offices leads inevitably to the development of caucuses and conventions. In the conduct of campaigns, leadership and discipline are indispensable, and hence we have concentration of power in the hands of party directors, and the organization of an army of party workers. When a party is in power, it fills offices, makes and enforces laws, grants franchises, and in a multitude of ways regulates private interests; and out of these functions come emoluments, cam-

[1] See *Readings*, p. 131.

paign funds, and enormous power over the lives of men. It is small wonder, therefore, where there are so many offices to be filled and so many advantages to be derived that our political parties have reached a high degree of organization and control.

Early Nominating Methods

The beginnings of this great system may be traced back into the colonial period, for it appears that even the Boston town meeting, so celebrated for its democratic character, had fallen into the hands of the caucus long before the Declaration of Independence.[1] After the organization of the independent governments, there was naturally an increase in the number of elective offices,[2] and, while in many instances candidates were brought before the public through personal negotiations or by the advocacy of a few friends, it was not long before more or less regular assemblies for the purpose of making nominations appeared everywhere throughout the states. For local and county nominations a general mass meeting composed of interested parties seems to have been the early method employed, but the controversies which arose in these assemblies led to a demand for regularity in composition, so that nominating conventions of official delegates soon began to appear alongside the mass meetings. For example, candidates for Congress and the state legislature in the county of Philadelphia were nominated in 1794 "at a large and respectable meeting of the freemen," but five years later, in 1799, we hear of a county convention in that city made up of three delegates from each ward. By the close of the eighteenth century, county conventions, composed of delegates representing lower units of government, seem to have been fairly well developed in Pennsylvania.[3] About the same time congressional and county conventions seem to have been regularly established in Massachusetts and in all other states where party contests had reached any degree of sharpness.

The state convention as a regular institution was a development of a later period. It is true that we hear of a state con-

[1] For John Adams' interesting account of the Boston caucus, see *Readings*, p. 12, note 1.

[2] See above, p. 89.

[3] Dallinger, *Nominations for Elective Offices in the United States*, pp. 21–23.

vention in Pennsylvania as early as 1788, but it seems to have disappeared before a device known as the legislative caucus. Owing to the difficulties of communication and the small number of elective state offices, the expedient of nominating state tickets by the convention method did not appear attractive to the politicians. For a time, therefore, nominations were made in a variety of fashions. For example, Judge Yates was nominated by the Federalists as a candidate for governor of New York, in 1789, by "a party meeting" held in New York City, at which Alexander Hamilton and several other persons were appointed a committee of correspondence to promote the election of their nominee. In 1792, George Clinton was nominated governor of that state at a Republican meeting held in New York City, said to have been composed of "gentlemen from various parts of the state."

The Legislative Caucus

It was not long, however, before the power of making state nominations was assumed by the members of each party in the state legislature, who organized themselves into an assembly known as the legislative caucus.[1] It was the practice for this caucus to meet officially, usually in the capitol building, select the candidates, and issue a signed proclamation or appeal for support. In conducting the campaign, the legislative caucus organized correspondence committees throughout the state. Although this newer device was more representative than the older irregular mass meetings which it supplanted, it was, of course, not so completely representative as the later state convention. For instance, if a county had no Federalist member in the state legislature, it would have no weight in the selection of the state candidates, although it might contain a number of Federalist voters. The injustice of this arrangement was recognized in New York as early as 1817, when the Democratic legislative caucus was reënforced by representatives of the Democratic voters from those counties which had Federalist members in the state assembly.[2]

In 1800 the legislative caucus was transferred to Congress as a mode of making nominations for President and Vice-President.

[1] For a description of a legislative caucus, see *Readings*, p. 112.
[2] *Ibid.*, p. 112.

It appears that early in the year 1800 a few Federalist members of Congress met in the Senate chamber for the purpose of coming to some decision with regard to the pending presidential election. Owing to the secrecy which shrouded this meeting, there is considerable uncertainty as to its real purpose. It is contended by some that Mr. Hamilton desired to use it to thwart Mr. Adams; and by others, that it was convened with a view to lending support to the candidacy of Mr. Adams. At all events it was roundly denounced by the Republicans as an attempt to coerce the voters; but it proved such an admirable device that the Republicans held one of their own for the purpose of selecting a nominee for Vice-President, the candidacy of Jefferson for the presidency being conceded. From this time forward the congressional caucus was regularly used in making presidential nominations until it was overthrown by the adoption of the convention system.

It was soon recognized that the method of nomination by the congressional caucus had made a revolution in the system set up by the framers of the federal Constitution, according to which the presidential electors were supposed to be free to vote as they pleased. Clearly the real power of selecting the President had passed from the hands of the electors to an extra-legal body. "The members of the two Houses of Congress," said Mr. Gaston, in a speech delivered in the House of Representatives in 1814, "meet in caucus or a convention and there ballot for a President or Vice-President of the United States. The result of their election is published through the Union in the name of a recommendation. This modest recommendation then comes before the members of the respective state legislatures. Where the appointment ultimately rests with them, no trouble whatever is given to the people. . . . Where in form, however, the choice of electors remains with the people, the patriotic members of the state legislatures, vieing with their patriotic predecessors, back this draft on popular credulity with the weight of their endorsement. Not content with this they . . . make out a ticket of electors and thus designate the individuals who in their behalf are to honor this demand of their suffrages. This whole proceeding appears to be monstrous; it must be corrected or the character of this government is fundamentally changed. Already, in fact, the chief magistrate of the United States owes his office principally to aristocratic intrigue, cabal, and management."

It was not, however, by constitutional amendment, as many members of Congress proposed, that the caucus method of making nominations was to be destroyed; it met its doom at the hands of the national convention organized by a popular uprising against the domination of the political leaders in Congress.

The Rise of the Nominating Convention

This uprising came with the democratic movement that carried Jackson into the presidential office.[1] The last congressional caucus was held in 1824, when a few friends of William H. Crawford gathered in the chamber of the House of Representatives and selected him as their candidate for the presidency.[2] The subsequent election showed that Jackson was by far the most popular candidate, although his support in Congress was almost negligible. Jackson's friends, therefore, turned fiercely upon the caucus. The legislature of Jackson's state, Tennessee, had already sharply denounced it,[3] and several other states followed this example. In the presidential election of 1828, no attempt was made to hold a congressional caucus. Jackson was nominated by "spontaneous" legislative caucuses and conventions held by his followers in the various states, and thus, to use a phrase then current, "King Caucus met his death."

About the same time, the legislative caucus was being abandoned as a machine for nominating state candidates. It appears that the state convention was revived in Pennsylvania as early as 1812, but it was not until 1823 that the last vestige of the older caucus system was swept away by the definite establishment of the convention composed of delegates supposed to have been regularly chosen.[4] In Rhode Island the mixed legislative caucus disappeared by 1825, and regular conventions, composed of delegates from all the towns in the state, were fully established in popular favor.[5] In New York, the nomination of Mr. Crawford for President by the congressional caucus at Washington

[1] See above, p. 108.

[2] For the minutes of this caucus, see *Readings*, p. 114.

[3] See *Readings*, p. 117, for this denunciation.

[4] J. S. Walton, "Nominating Conventions in Pennsylvania," American Historical Review, Vol. II, pp. 262–278.

[5] *Proceedings of the Rhode Island Historical Society*, Vol. I, pp. 258–260.

resulted in the call of a Jackson conference which resolved that a state convention, composed of the same number of delegates as the lower house of the state legislature, should be chosen by the voters opposed to Mr. Crawford and in favor of "restoring to the people" the choice of presidential electors. This convention assembled at Utica in August, 1824, and thus began the regular convention system in the state of New York. In general, the legislative caucus had been most violently opposed by the disgruntled politicians, who had failed to carry their plans in it, and they eagerly welcomed the convention system as a method of ousting the older machine.

The state convention, composed of delegates selected by party voters, afforded a splendid model for a national convention; and in 1831 this piece of state political machinery was brought into use for national purposes. About this time, there had sprung up a violent opposition to secret societies, especially to the Masonic fraternity, on account of the mysterious disappearance of a man who had proposed to reveal Masonic secrets. It was contended that Free-Masonry was a political danger; and at a preliminary assembly of Anti-Masonic delegates at Philadelphia in 1830, a call was issued to all opponents of secret societies to send delegates to a convention for the purpose of selecting candidates for President and Vice-President. The following year the first national convention, composed of 114 Anti-Masonic delegates, assembled at Baltimore, and nominated a ticket which was sadly defeated in the ensuing election. Although the Anti-Masonic party speedily disappeared, it initiated a revolution in our national political machinery.

The example thus set by the Anti-Masons was followed in December of the same year by the assemblage of a convention, representing the National Republican or Whig party, at the city of Baltimore. There were present 156 delegates, representing eighteen states and the District of Columbia. Clay was nominated as the candidate of the party for President; a delegation was sent to Washington to notify him, and received his acceptance; and an appeal to the voters, called "the first platform ever adopted by a national convention," was drawn up. Furthermore, a campaign committee, composed of one member from each state selected by the delegations at the convention, was instituted. Although the nomination of Andrew Jackson

by the Democrats to succeed himself was a foregone conclusion, a Democratic national convention was called for the purpose of putting forward Jackson's friend, Van Buren, for the office of Vice-President. It seems that Mr. Lewis, an astute wire-puller, conceived this device as a means of excluding rivals from the field; and it appears that Amos Kendall, a member of Jackson's kitchen cabinet, persuaded a Democratic member of the New Hampshire legislature to use his local legislative caucus in calling a national convention.[1] This assembly met at Baltimore in the spring of 1832, and, as Jackson had shrewdly planned, nominated Van Buren for the office of Vice-President.

As the scheme worked so excellently in this instance, Jackson determined to use it to secure the presidency for Van Buren in 1837. Accordingly he wrote to a friend suggesting a national party assembly "fresh from the people" for the purpose of nominating candidates. The convention met in Baltimore in the spring of 1835, and, according to the well-laid plan, nominated Van Buren. Preparatory to the election of 1840, the Whigs and the Democrats held general party assemblies to choose their candidates; and since that time all parties have uniformly employed the national convention in selecting nominees for President and Vice-President.

It was many years, however, before each party was so completely organized down to the election district or precinct as to secure regularity in the choice of delegates. In the earlier period it seems that delegates to the national convention were sometimes chosen by state conventions, sometimes by legislative caucuses, and sometimes by local meetings. Even as late as 1864 some of the delegates to the Republican (or Union) national convention were selected by legislative caucuses. Owing to this irregularity in choice, there were always many contesting delegates, and, as there was no possibility of applying definite rules, it seems that the majority of the convention usually decided contests by admitting their own supporters. Occasionally, however, it was found expedient to placate both factions, and consequently the two contending delegations would be admitted, each member being given one-half a vote.

Once established, the national convention and its accompany-

[1] For the opening address at this convention, see *Readings*, p. 119.

ing political devices began to force, steadily and persistently, the completion of the party system down to the lowest unit of local government in every state and territory. The Republican call for the national convention after the year 1884 provided that the delegates at large should be chosen by state conventions, and that the other delegates should be selected by congressional conventions. The necessity of deciding between contesting delegations forced the national committee and the convention to look into the rules and regulations governing the selection of delegates, and as a result, from year to year, the rules of state party organizations controlling primaries and local party conferences became more and more precise. Although the call of the Democratic national convention left the selection of all delegates to the determination of the convention in each state, the result was the same.

The national party organization was further developed and centralized shortly after the close of the Civil War by the establishment of a congressional campaign committee at Washington for the purpose of directing congressional elections. The committee of each party was composed, either principally or entirely, of members of Congress selected by their party colleagues for their astuteness in conducting campaigns. This committee has always worked in more or less close relations with the national committee and has been able to penetrate into the local politics of many districts more deeply than the larger committee has been able to do.

The Forces Working for Strong Party Organization

The pressure for organization and discipline brought to bear upon the states and other subdivisions by the national machine was increased very powerfully by local circumstances. The keen competition of parties for the offices and their spoils necessitated closer coöperation, more discipline in the ranks, and more efficient leadership. Thus it came about that in a number of western and southern states the convention system and its accompanying organization had to be adopted, although they were odious to the more independent politicians. As Mr. Lincoln pointed out in Illinois, in defence of the adoption of the convention by the Whigs, it was madness for any political party

constantly to suffer defeat on account of dissensions in its own ranks which might be avoided by a general agreement in a party convention.[1] The necessity for state and local party organization was further emphasized by the transformation of the older appointive offices into elective offices, and by that rapid increase in the number of government officials which inevitably accompanied the social and economic development of the commonwealths.

As the large number of elective offices made it impossible for the mass of the people to join in making nominations and running the political machinery, party business fell more and more into the hands of the politicians who were experts in the mysteries and the manipulations of primaries and elections. Wherever important elective offices were created, machinery for making party nominations inevitably followed, with its long train of primaries, caucuses, and conventions. Each new elective office only added to the weight, complexity, and strength of the party machine.

Party organizations gathered great power also from the development of railways and industries within the states. With this economic advance charters, franchises, and special legislation were in great demand, and the political party that controlled a state legislature had within its gift privileges of almost priceless value. The agents of corporations learned that they could best secure their coveted advantages by making terms with the leaders of the political organizations, who would in turn manipulate the primaries and conventions in such a way as to secure control of the necessary instruments of government.

Party organization in the South was greatly strengthened after the Civil War by the strenuous efforts of the whites to oust the Republican "carpet-baggers," retire the negroes from the polls, and secure their ancient dominion. Any respectable white man who refused to coöperate with the Democratic party in its determination to reconquer the position that had been lost by the war was regarded as a traitor to his community. Thus the South became "solid," and the government in each commonwealth was identified with the organization of the Democratic party.[2]

[1] For this important document, see *Readings*, p. 123.

[2] See *Readings*, p. 402.

The way to offices, honors, and emoluments was only open to champions of the ruling white organization, and the freedom of debate and discussion, which was so characteristic of the South before the Civil War, was supplanted by party discipline that kept the ranks in order against "negro domination."

The rise of cities added a new element of strength and complexity to party machinery. As the great cities of Boston, New York, Cincinnati, Philadelphia, Chicago, and St. Louis forged to the front they offered unparalleled opportunities for the organization and discipline of party workers. The election of the municipal officers led to the establishment of municipal primaries, caucuses, conventions, and committees — wheels within wheels, the mysteries of which could only be understood by expert politicians who kept constant watch on their operation. It was not only the spoils of the offices — their fees, salaries, and other emoluments — that attracted the politicians and led them to organize their armies of workers. Franchises for street railway lines, water works, gas and electric light plants, telephones and telegraphs, elevated railways, and subways had to be granted; and whoever possessed the political power in the municipality could form a connection with the private interests seeking privileges, which would yield revenues undreamed of by kings of old. With the concentration of population the number of saloons increased; the liquor interests began to fight for licenses and for immunities from the enforcement of the closing laws; and the saloons in every ward and precinct naturally became political centres in close connection with the powers higher up that were manipulating the whole political machine.[1]

The Rise and Development of Tammany Hall

The evolution in municipal political machinery is illustrated in a striking manner by the rise and development of Tammany Hall in New York City. This organization was established sometime before 1789, for the purpose of connecting "in indissoluble bonds of friendship, brethren of common attachment to the political rights of human nature and the liberties of the country."

[1] See *Readings*, p. 505, for the interesting testimony of a New York police-captain as to the connection established between the saloons and the dominant political organization.

It seems that William Mooney, an Irishman of humble extraction, anxious to "diffuse the light of liberty," was chiefly instrumental in the organization of this society.[1] As its purposes were patriotic and benevolent, it took the name of an Indian chief of William Penn's time, Tammany, celebrated for his wisdom, peace, diplomacy, and exemplary life. Tammany had been canonized as a saint by the Revolutionary army in place of St. George, the slayer of the dragon and the patron protector of the British army. In honor of this noble red man, a number of Tammany societies had been established at various points throughout the East. The New York organization, therefore, got its name from older societies, and, as if to give more weight to its American character, it took the name of Columbus also and called itself "the Tammany Society or the Columbian Order."

The early purposes of the Tammany Society were social and patriotic rather than political, and it seems strange to say that some of the first leaders were decidedly anti-Catholic. As a secret society its membership was limited; candidates were initiated according to prescribed rites; and officers bearing Indian titles were elected. The Society, however, in its membership and spirit was in decided contrast to the more aristocratic classes of New York City. When it was incorporated in 1805, its avowed object was to afford "relief to the indigent and distressed of the said association, to widows and orphans, and others who may be found proper objects of free charity."

The Tammany Society seems to have entered politics in support of Jefferson during the hot campaign of 1800, and from that time forward it began to exercise more and more control over elections in the city. The extension of the suffrage by the state constitutional convention of 1821 strengthened its hold upon the working-class electors of the city; and its influence was further advanced on the adoption of universal manhood (white) suffrage by the constitutional amendment of 1826.[2] A few years later the great famines in Ireland began to drive thousands of Irish peasants to America. They were received with open arms by

[1] The traditional date, 1789, for the establishment of Tammany Hall seems to be wrong, and even Mooney's part in it is uncertain. See Dr. E. P. Kilroe, *St. Tammany and the Origin of the Tammany Society* (New York, 1913).

[2] See above, p. 85.

the Tammany Society, and through that organization many rose to positions of wealth and influence.

As the population of the city and the membership in the Society increased, a Democratic-Republican political organization was slowly evolved which was nominally distinct from the Columbian Order. This political organization, in the beginning, took the form of a "general meeting" composed of members of the Society and its political supporters. At length, about 1822, the general meeting was supplanted by a general committee composed of delegates elected at ward primaries; and in due time complete control over the Society and the Democratic-Republican organization, formed in connection with it, passed into the hands of a sub-committee of the general committee.[1] For practical purposes, moreover, the leading members of the general committee and the sub-committee were at the same time officers and leading members in the Tammany Society.

With the victory of the Jeffersonian party in the presidential election, the spoils of federal offices in New York City began to fall to the leaders in the Tammany organization. In 1839 the organization elected its first mayor of New York, and thus the spoils of local offices were added to the rich gains made in federal elections. The Society was further strengthened by the multiplication of municipal offices, and the astounding rise in local expenditures. Here were unlimited opportunities for an astute leader bent upon the manipulation of politics for his own personal gain.

This leader appeared in 1863 in the person of William Marcy Tweed[2] who, in that year, became chairman of the general committee of Tammany Hall and the Grand Sachem of the Tammany Society. Tweed was born in 1823; he was educated at a public school, and entered politics in his ward as a fireman in a volunteer company about 1850. He was shortly elected to the county board of supervisors, which had large powers distinct from those of the city authorities, in levying local taxes and spending money for county buildings and improvements. He served on this board for a period of thirteen years, being four times elected its president; and he used the financial power which it gave him

[1] See below, chap. xxx.

[2] There were, however, leaders of some renown before Tweed's day.

to extend his authority over the other branches of the city administration. From this point of vantage he began an organization within the Tammany Society for the purpose of controlling the city administration. In 1869, the Tweed group had possession of the mayor's office, the common council, the district attorney's office, the county and city treasury, the street department, the comptroller's office, the municipal judgeships, the speakership of the assembly at Albany, the state legislature, and even the executive department of the state.[1]

The pernicious operations of this group when in control of the metropolis and the commonwealth cannot even be catalogued here. Between 1860 and 1871 the debt of the city was multiplied nearly fivefold; a county courthouse which was to cost $250,000 really cost more than $8,000,000, the taxpayers being charged $470 apiece for chairs and $400,000 apiece for safes; and under the specious title of "general purposes" enormous sums of money were paid out fraudulently by the comptroller. In short, no bounds seem to have been set to the ambitions of Tweed and his fellow-workers; but they overreached themselves in 1871, when their operations were exposed by the New York *Times*. A committee of indignant citizens was formed to break up the ring, and prosecute the criminals. Tweed was arrested on the charge of having stolen $6,000,000; he was convicted, fined, and sentenced to twelve years in prison in 1873; released on an order of the court of appeals, he was rearrested and confined in Ludlow Street jail, from which he escaped in 1875, only to be arrested in Spain and brought back to prison, where he died shortly afterward. The other leading members of the ring were likewise made to feel the penalties of the law.

The exposure of this group of astute and unscrupulous political operators showed to the American people for the first time the precise ways in which powerful political machines might be built up out of the spoils of municipal offices and municipal privileges. New York City has not been the only sufferer from exploiting political organizations; Philadelphia, Chicago, Cincinnati, St. Louis, San Francisco, and, in fact, every other American municipality of any size, has had an experience not differing fundamen-

[1] For Croker's own description of his Tammany organization, see *Readings*, p. 567.

tally in kind, however much in degree, from that which New York encountered at the hands of Mr. Tweed and his followers.

The Abuses of Political Organizations

With the development of powerful national, state,[1] and municipal political machinery there came innumerable specific abuses. In order to secure pliant tools as delegates to conventions and members of committees, the political directors frequently devised practices which excluded the honest voters from participation in the party primaries. They instituted the "snap primary," that is, one held without proper notice, or unexpectedly, or at some unusual date. They packed primaries with their henchmen, who would drive out or overwhelm any dangerous opponents.[2] They padded the rolls of party members with the names of dead men, or men who had long ago left the community. They stuffed the ballot boxes and they prepared the slates which were forced through the nominating conventions in the face of opposition. They entered into alliance with railway and other corporations from whom they received campaign contributions or levied tribute in other forms.[3] It was thus that Jay Gould was able to declare, with a note of triumph: "I wanted the legislatures of four states, and to obtain control of them, I made the legislatures with my own money; I found this plan a cheaper one." Municipal councils and state legislatures all too frequently granted franchises, special laws, and innumerable privileges without regard to public welfare or the future of the country, generally under the dominance of political leaders who had sold out to the privilege-seekers.

More open, though by no means as dangerous, was the continual extension of the spoils system under which public offices were distributed for party services, and efficiency in administration sacrificed to strengthen political machines. In cities, states, and at Washington the spoils system took possession of politics.

[1] For Mr. Wanamaker's description of the Pennsylvania machine, see *Readings*, p. 128.

[2] For an example, see *Readings*, p. 585.

[3] For the practices of the Sugar Trust, see *Readings*, p. 572; see also Ostrogorski, *Democracy and the Organization of Political Parties*, Vol. II, pp. 149–204; for the way the politicians sometimes laid tribute on railway corporations, see *Readings*, p. 478.

Even a man of the courage and integrity of Lincoln was unable to resist the demands of the spoilsmen. A member of Congress who had secured a local postmastership for a henchman demanded his removal on personal grounds; "and I must turn him out," said Mr. Lincoln; "I do not want to but I must, — there is no help for it." When a friend asked Lincoln whether he or the congressman was President of the United States, Lincoln quickly replied that the congressman was President.

Standing on this firm economic foundation, — the spoils of office and special privileges, — the organizations of the two great parties seemed in a fair way to escape from popular control altogether. Men of great ability, who sought to work independently, were promptly shown that all avenues of advancement would be closed unless they consented to at least some of the leading schemes of the directors. "The party," says Ostrogorski,[1] "became a sort of church which admitted no dissent and pitilessly excommunicated any one who deviated a hair's-breadth from the established dogma or ritual, were it even from a feeling of deep piety, from a yearning for a more perfect realization of the ideal of holiness set before the believer." This spirit of party loyalty was reflected in an editorial of the Richmond *Whig* in 1843, on the "no-party man." "We heartily join," said the editorial, "in desiring the extermination of this pestiferous and demoralizing brood, and will do whatever we can to effect it. . . . Let the Whigs and Democrats everywhere resolve that the gentry who are too pure to associate with either of them or to belong to either party, shall not use them to their own individual aggrandizement. Let them act upon the principle that the Whig or Democrat who has sense enough to form an opinion, and honesty enough to avow it, is to be preferred to the imbecile or the purist, or the mercenary, who cannot come to a decision, or is ashamed of his principles, or from sordid considerations is afraid to declare them." The party alignment, sharp enough before the Civil War, became even sharper for a long time after that great crisis, so that political independence or sympathy with any "third party" principles came to be regarded as a species of treason and intellectual dishonesty.

Each of the two great party organizations rested upon the

[1] Vol. II, p. 92.

supposedly popular basis of the party primaries, in which, theoretically, every party member could share in the choice of candidates and the determination of party policies. It was on the primaries, therefore, that the standing army of party workers, supported by the spoils of politics, concentrated their attacks; they were always busy; they knew when the term of every officer expired and new nominations must be made; they knew the dates and places of primary meetings, and, as eternal vigilance was the price of victory, they took possession of the field, leaving the ordinary citizen engaged in the pursuit of a livelihood in other than political methods to grumble at being dispossessed of his political power.

Attempts to Subject Parties to Legal Control

Amid the momentous changes which followed the Civil War, — the rapid growth of industries, the swift development of the Great West, — the citizens were so much engrossed in private affairs that they let the politicians have full and undisputed sway for almost a generation. Slowly, however, there came an awakening to the fact that, important and necessary as party organization was in a democracy, it might be perverted from its true function of representing and carrying into effect popular will. Thereupon public-spirited men began a struggle for legislation which would substitute regular, compulsory, and public practices for the voluntary customs which the parties had developed under the direction of leaders.

The first attack was made upon the ballot and elections. Up until about 1880 the printing and distribution of ballots was left entirely in the hands of the various political organizations, and, generally speaking, there was no secrecy at all about elections, for each party furnished its members with ballots of a certain color, and it was easy to see how every one voted. The cost of printing ballots deterred poor men from entering politics, and made it well-nigh impossible for a third party, with no spoils, to gain a foothold. In the early eighties, a cry went up from the reformers for the introduction of the Australian ballot system, according to which public authorities were to furnish the ballots for all parties and provide complete secrecy for the voters. The most extravagant claims were advanced for this new reform: "It

would not only put an end to bribery and intimidation of the electors and to frauds in the taking of the vote, but it would undermine the very foundations of the Machine: it would deprive it of a pretext for interfering with elections, for employing 'workers,' for levying assessments, and would strip its candidates of their privileged character; the assent of the Machine would no longer be required for getting on the printed list; the state, which would henceforth make up this ballot, would enter every candidate on it whether recommended by a party organization or not, would submit them all without distinction to the electors; a poor man would therefore have the same facilities as a rich man, and an independent the same chances as a party hack of entering public life. The promoters of the reform succeeded in creating a genuine current of opinion in its favor; sermons were preached in the churches for the Australian ballot, numerous petitions were addressed to the legislatures, and eventually the reformers ended by intimidating the politicians intrenched in those assemblies." [1] State after state adopted the Australian system, and assumed the responsibility of printing and distributing the ballots and safeguarding the secrecy of elections until by the end of the first decade of the twentieth century all but two states had adopted it in some form.[2] It has failed to realize the high hopes of its promoters, but it has been of such undoubted service in purifying elections that no one would think of returning to the old methods.

The failure of this serious attempt to abolish party machines by merely regulating elections while leaving the preliminary nominating work to the untrammelled control of party organizations, soon raised a demand that the state should go behind the elections and supervise the primaries of parties, their committees, conventions, and campaign funds.

Even before the adoption of the Australian ballot, California seems to have opened this new phase in the evolution of party government by passing, in 1866, a tentative measure providing for regularity and publicity in the conduct of primaries and caucuses, but at the same time allowing party committees to decide whether the rules laid down in the statute should become binding on them. Five years later, Ohio enacted a law contain-

[1] Ostrogorski, Vol. II, p. 500. [2] See below, chap. xxx.

ing similar optional regulations; and in a short time other states followed with uncertain and halting steps the examples thus afforded. The notion of compulsory regulation of party concerns was vigorously combated, because it was urged that whenever the members of a party believed abuses existed the voluntary adoption of the statutory regulations would immediately follow. Logic, however, was defied by events, or rather by pressures which were not apparent to the logicians. Permissive statutes failed completely to accomplish the purpose for which they were at first deemed sufficient. After a lapse of a few years, during which the results of the Australian ballot were awaited, there began to come from our state legislatures a series of compulsory statutes, attacking first the minor features of party organization and operations, and then extending in every direction, until the laws of the last decade have made the party system an integral part of the legal framework of government. "The method of naming candidates for elective public offices by political parties and voluntary political organizations," runs the Oregon primary law of 1905, "is the best plan yet found for placing before the people the names of qualified and worthy citizens from whom the electors may choose the officers of our government. The government of our state by its electors and the government of a political party by its members are rightfully based on the same general principles." [1]

A careful, but probably not exhaustive, review of the state legislation of the six years 1901–1906, reveals more than sixty-two statutes, many of them broad and comprehensive, regulating political parties in their varied operations.[2] The years

[1] For this interesting preamble, see *Readings*, p. 132.

[2] In 1901 statutes relating to primaries were enacted in Nebraska, California, Connecticut, Florida, Georgia, Illinois, Indiana, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New York, North Dakota, Oregon, and Tennessee; in 1902, in Maryland, Massachusetts, Minnesota, Mississippi, and New York; in 1903, in California, Florida, Idaho, Maine, Massachusetts, Nebraska, New Hampshire, New Jersey, and Rhode Island; in 1904, in Alabama, Louisiana, Massachusetts, New Jersey, Ohio, Oregon, and Wisconsin; in 1905, in Arizona, Connecticut, Florida, Illinois, Indiana, Maine, Massachusetts, Nebraska, New Hampshire, North Dakota, South Carolina, South Dakota, Tennessee, Wisconsin, Michigan, Montana, and Oklahoma; in 1906, in Illinois, Maryland, Pennsylvania, Texas, Louisiana, Michigan, and Wisconsin. For a review of primary legislation see current issues of the Political Science Review and also the *American Year Book*.

1907–08 showed no relaxation of legislative activity in this direction, for they gave us the most revolutionary direct primary laws yet devised: those of Wisconsin, New Jersey, Iowa, Illinois, Missouri, Nebraska, Washington, and Kansas, leaving out of account less striking measures. Oklahoma came into the Union in 1907 with a startling constitution requiring, among other things, that the legislature shall enact laws for a mandatory primary system which shall provide for the nomination of all candidates in all elections for state, district, county, and municipal offices, including that of United States Senator. In New York, Governor Hughes urged drastic reform in the primaries and party machinery at the legislative sessions of 1908, 1909, and 1910; and Maine, Massachusetts, and New Jersey adopted state-wide primary laws in 1911; New York followed in 1913 and in subsequent years there was a steady extension of the principle of direct nominations. In the presidential campaign of 1912 a preferential primary was used in the nomination of candidates in several states. It was confidently predicted that the national nominating convention would be superseded by the primary, but the prophecy was not fulfilled. In 1916 the presidential primary received little attention, while the convention enjoyed its old prestige. In 1920 the primary was again extensively used.

The primary laws fix the dates and places of party primaries, provide official ballots furnished by the government to all parties without charge, regulate the composition and powers of party committees, abolish conventions altogether or control their composition and procedure, institute, in many instances, direct nominations by party vote for nominations by conventions, forbid contributions by corporations, compel party committees to account for the receipt and disbursement of funds, limit the amount which the respective candidates may spend, and otherwise control the machinery and practices of all parties.[1]

[1] This whole subject is treated in great detail below, chap. xxx.

PART II

THE FEDERAL GOVERNMENT

CHAPTER VIII

THE GENERAL PRINCIPLES OF THE FEDERAL SYSTEM OF GOVERNMENT

The Doctrine of Limited Government

It is a common error to regard the federal Constitution as an instrument relating solely to the government that has its seat at Washington. In reality, it provides a general political system by distributing the public functions between the state and national governments and by laying down certain fundamental limitations on the powers which each may exercise. In other words, while creating a national executive, legislature, and judiciary, and marking out their spheres of power, the Constitution, expressly and by implication, also limits the domain within which the government of each state must operate. It does more: it creates a system of private rights secure against all government interference; it provides for each person "a sphere of anarchy" [1] — of no government — so to speak, within which he may act without any intervention on the part of public officials. In some matters the individual is protected from the federal government, in others from the state government, and in still others he is entirely free from both governments. These limitations are not mere political theories or vague declarations of rights; they are fairly precise rules of law expounded and applied by the courts, enforced by proper executive authorities, and respected by the citizens.[2]

[1] See Burgess, *Political Science and Constitutional Law*, Vol. I, pp. 174 ff.

[2] For the constitutional limitations on the federal government, see *Readings*, pp. 134 ff., and on the state governments, *ibid.*, pp. 391 ff. By a comparison the limitations common to both may be ascertained.

This system of private rights or individual liberty, however, cannot be understood by learning the clauses of the Constitution which contain prohibitions on the state and federal governments. It is really a difficult and technical branch of law, to be mastered only by a painstaking examination of a long line of judicial decisions interpreting those clauses. Failure to recognize this fact constantly leads to many incorrect assertions about "the rights of American citizens." For example, the police of a city forbid a Socialist parade or break up a street corner meeting; immediately there appear in the newspapers letters from indignant citizens denouncing the police for preventing the exercise of the "rights of free speech guaranteed by the Constitution of the United States." An examination of the clause, however, to which they refer shows that it is *Congress* that can make no law abridging the freedom of speech, the states being left to their own devices in dealing with such matters. It is not only ill-informed citizens that make this error. Such a serious and responsible body as the Republican national convention in 1860 asserted in its platform, "That the maintenance of the principles promulgated in the Declaration of Independence and embodied in the federal Constitution, — 'that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed,' — is essential to the preservation of our republican institutions." Of course any student of history and law knows that the Constitution does not embody any such principles, and that the federal government is controlled only by the definite rules of law imposed by the written instrument itself.

The fundamental character of these rules may be best illustrated by a comparison with the English system. Any law passed by Parliament, — that is, by King, Lords, and Commons, — must be enforced; it cannot be called into question by any court; the only remedy for the citizen is at the ballot-box when members of the House of Commons are elected. If the British Parliament, therefore, should pass a law confiscating the land now owned by private persons, there would be no relief for the victims, unless the same Parliament or a succeeding one could be induced to repeal the law in question. If the Congress of the

United States, however, should pass such a measure, it would be the duty of the courts on the presentation of the proper case to protect the land-owner in his property rights by declaring the law null and void, — in conflict with that section of the Fifth Amendment which provides that no person shall be deprived of life, liberty, or property without due process of law; and that private property shall not be taken for public use without just compensation.[1] Likewise if the legislature of a state should pass such a measure it would be the duty of the courts to protect the citizen under the Fourteenth Amendment forbidding any state to deprive a person of life, liberty, or property without due process of law — compensation being, under judicial interpretation, an indispensable feature of "due process."[2]

In considering the limitations on the federal government, we must remember at the outset that Congress differs fundamentally from a state legislature. The former has only those powers which are expressly conferred by the clauses of the written instrument; the latter enjoys all powers of government, except those denied to it by the federal Constitution and the state constitution under which it operates. The limited character of congressional authority is evident in the Constitution itself; and it is expressly enunciated in the Tenth Amendment, declaring that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Nevertheless, Congress, acting under the clause authorizing it to make all laws necessary and proper for carrying into execution the powers expressly conferred, has been by no means as limited as the literal interpretation of this doctrine would seem to imply.[3]

Private Rights under the Federal Constitution[4]

The constitutional limitations on the federal government fall into two groups:[5] (*a*) Those designed to protect personal liberty

[1] Of course private property cannot be taken for private use at all.

[2] It should be noted, however, that the state retains its "police power" in spite of the constitutional limitations — that is, its power to make laws in the interest of health, public safety, morals, etc. See *Readings*, p. 394 and below, chap. xxii.

[3] *Readings*, pp. 66 ff. and 237 ff.; see above, p. 72.

[4] Reference: Burgess, *Political Science and Constitutional Law*, Vol. I, pp. 184 ff.

[5] The limitations on state government are discussed below in chap. xxii.

against arbitrary interference on the part of the government, and (*b*) those designed to protect private property against confiscation and irregular action on the part of federal authorities.

I. The limitations on behalf of personal rights, which, under the Constitution run against the federal government, may be divided into five classes. In the first place, Congress cannot make any law respecting the establishment of a religion, nor can it interfere with the freedom of religious worship. This does not mean, however, that any person has a right to commit an act, under the guise of a religious ceremony, which transgresses the ordinary law of the land. This point was discussed by the Supreme Court in a case involving the right of Congress to prohibit polygamy in the territory of Utah and punish offenders who violated the law.[1] Under this statute a Mr. Reynolds, who was indicted for the crime of polygamy, set up by way of defence the contention that under a religious sanction and according to a religious ceremony, he had married two wives. The Court held, however, that religion has to do only with the relations of man to "an extra-mundane being," and that no citizen can claim a right, in the name of religious freedom, to violate a criminal statute.

In the second place, Congress has no power to abridge freedom of speech or of the press.[2] It was the purpose of this clause to prevent Congress from establishing a press censorship or enacting any law prohibiting political criticism. In spite of this express provision, Congress passed in 1798 a Sedition Act providing heavy penalties for resisting the lawful acts of the federal officials and for publishing anything bringing or tending to bring the federal government or any of its officers into disrepute. Under this act many American citizens were fined and imprisoned for what would be regarded to-day as harmless criticism of public authorities. After the declaration of war on Germany in 1917 Congress passed an Espionage Act imposing penalties for those who attempted to cause disloyalty in the armed forces, obstructed enlisting, or violently attacked the government of the United States. The Sedition Act of May 16, 1918, was even more drastic and sweeping in its terms. The constitutionality of this legislation was challenged, but the Supreme Court sustained it.

[1] Reynolds *v.* United States, 98 U. S. R., 145.

[2] In the territories and the District of Columbia, of course, Congress, having general legislative power, can establish the law of libel and slander.

In the third place, the Constitution guarantees to the people the right to assemble peaceably and petition the government for redress of grievances. This right is upheld against state governments as well as the federal government; but, of course, it does not secure to the petitioners the privilege of having their petition acted upon by the federal authorities.[1]

In the fourth place, the power of the federal government to punish persons is hedged about in many ways. Congress has no power to define treason; it is defined in the Constitution: "Treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort." Congress cannot, therefore, vindictively declare any act treason which does not meet its approval.

Furthermore, the trial of persons accused of this high crime is carefully safeguarded. No person can be convicted of treason unless on the testimony of two witnesses to the overt act or on confession in open court. In the case of the United States *v.* The Insurgents,[2] the Court, interpreting a federal statute, ordered that the names of the jurors and a list of witnesses should be furnished the accused; and that a reasonable time be allowed for the defence to prepare its case after receiving this information. The Court, furthermore, declared that until the overt act of treason had been proved by testimony of two witnesses, no evidence relating to the charges could be introduced.

While Congress has the power to provide the penalties for treason, the Constitution expressly stipulates that no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted. In old English practice, corruption of blood meant the destruction of all inheritable qualities, so that any attainted person could not inherit lands or other hereditaments from his ancestors nor retain those which he already possessed or transmit them to his heirs.[3] The constitutional provision mentioned above was designed to prevent this punishment of the relatives of traitors; and accordingly no punishment or proceedings may be construed to work a forfeiture of the real estate of a traitor longer than his natural life.[4]

[1] Burgess, *Middle Period*, pp. 253–296.
[2] 2 Dallas, 335.
[3] Story, *Commentaries on the Constitution* (5th ed.), sec. 1299.
[4] Bigelow *v.* Forrest, 9 Wallace, 339.

In the fifth place, proceedings against persons charged with crime under the federal law are controlled by several explicit provisions. Congress cannot act as a court by passing a bill of attainder condemning any person to death or to imprisonment or imposing any penalty whatsoever. Congress can pass no ex post facto law; that is, no law making an act a crime which was not a crime when committed, or adding new penalties after a commission of an act, or modifying the procedure in any such way as to make it substantially easier to convict.[1] Federal authorities have no power of arresting wholesale on general warrant; all warrants of arrest must be issued only upon probable causes supported by oath or affirmation and particularly describing the place to be searched and the persons and things to be seized. Indictment by grand jury and trial by jury are secured to all persons coming within the jurisdiction of the federal authorities, except in the insular possessions.[2] The writ of habeas corpus cannot be suspended unless in case of rebellion or invasion, when it may be required by public safety; that is, under all ordinary circumstances any person held by federal authorities has the right to have a speedy preliminary hearing before a proper judicial tribunal.[3] Excessive bail cannot be demanded by federal authorities; in other words, except in capital cases, federal courts must release prisoners on bail, and must not fix the amount at such an unreasonable sum as practically to deny the right. Finally, in general, the federal government must allow due process of law in all of its criminal proceedings: the trial must be open and speedy and in the state and district where the crime was committed; the defendant must be informed of the nature and cause of the charge against him; the witnesses against him must be brought face to face with him; he may force, by compulsory process, the attendance of witnesses in his favor; he cannot be compelled to testify against himself in any criminal case; and he has a right to have the assistance of counsel in his own behalf.[4]

[1] Of course, Congress is not so limited in making laws applicable to acts which may be committed in the future.

[2] See below, chap. xxi.

[3] Below, chap. xv.

[4] It must be noted that these privileges in criminal matters are not extended to cases arising in the land and naval forces or in the militia when in active service in time of war or public danger. See below, chap. xvii.

II. The limitations on the federal government [1] in behalf of property rights are relatively few in number, but they are fundamental in character. The power to define property is under our system left to the state governments, subject to the one great restriction that slavery and involuntary servitude, that is, property in man, shall not exist. Congress has no power to define property except in the territories not organized into states.[2] Moreover, the Constitution provides some explicit limitations on the power of the federal government to attack the property of private persons: Congress cannot impose duties on articles exported from any state; all direct taxes must be apportioned according to the population so that a majority of the people cannot shift the burden of direct taxation to the minority.[3] Duties, imposts, and excises must be uniform, that is, must fall upon the same article with the same weight everywhere throughout the United States. In order to protect the taxpayer, it was provided in the Constitution that revenue bills must originate in the House of Representatives, which is composed of members chosen directly by the voters; but this provision is a dead letter in practice. The Constitution also stipulates that no money shall be drawn from the treasury except under appropriations made by law; consequently the executive authority cannot on its own motion withdraw money from the public treasury.

It is not only by way of taxation that the federal government may approach private property. It enjoys the power of eminent domain; in other words, it may take private property for public use; but it must make just compensation to the owner. In determining what is just compensation, federal authorities must take into account the use for which the property in question is suitable and pay due regard to the existing business or wants of the community and such as may be reasonably expected in the immediate future. The proceedings in ascertaining the value of property taken for public use may be prosecuted before commissioners or special boards or the courts, with or without the

[1] For federal limitations on state governments in behalf of property, see below, chap. xxii.

[2] Congress may define property, however, in inventions and publications under its right to grant to authors and inventors special privileges with regard to their respective writings and discoveries.

[3] Excepting income taxes. Above, p. 71.

intervention of a jury as Congress may determine. All that is required is that the examination into the value of the property shall be conducted in some fair and just manner affording to the owner of the property in question an opportunity to present evidence as to its value and to be heard on that matter.[1]

The Separation of Powers

Second in importance to the doctrine that our government is limited by certain fundamental principles of law is the theory that the power conferred on the federal government must be distributed among three distinct departments: legislative, executive, and judicial. This is a doctrine which publicists delight to expound with great show of historical learning; it is a legal principle interpreted by the courts and applied to concrete cases like any other rule of the Constitution;[2] it is a political slogan reiterated in Congress with great vehemence, especially in times when the President, expressing more accurately the living forces of the nation than do the Senators and Representatives, overshadows, in influence, the legislative branch of the government.

According to the traditional account, this doctrine came into our law and practice from Montesquieu, whose treatise on the *Spirit of the Laws* was a veritable political text-book for our eighteenth-century statesmen, and it was derived by that distinguished French author from his study of the English constitution. In point of fact, however, the doctrine, as far as Montesquieu was concerned, was a notion which he acquired during a conflict between the judiciary and king in France in which he participated, and afterwards read into his study of the institutions of England.[3] As a principle of law and government, it is a part of that system of checks and balances and subdivisions of power by which statesmen have sought to prevent the development of that type of democracy that functions through simple legislative majorities.[4] It is explained with great insight by

[1] Boom Co. *v.* Patterson, 98 U. S. R., 403; United States *v.* Jones, 109 U. S. R., 513.

[2] See *Readings*, p. 138, for an important judicial decision on this point.

[3] Hatschek, *Englisches Staatsrecht*, p. 24.

[4] The place of the theory of separation of powers in the evolution of government is thus described by Treitschke in comparing Sièyés and Rotteck:

Madison,[1] and thus eloquently defended by Webster: "The spirit of liberty . . . is jealous of encroachments, jealous of power, jealous of man. It demands checks; it seeks for guards; it insists on securities; it intrenches itself behind strong defences, and fortifies itself with all possible care against the assaults of ambition and passion."

The doctrine is not expressly stated in a separate article in the federal Constitution, as in several state constitutions, but is thus embodied in the opening sentences of the three articles relating to the legislative, executive, and judicial power: "All legislative powers herein granted shall be vested in a Congress of the United States. . . . The executive power shall be vested in a President of the United States. . . . The judicial power . . . shall be vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish." Thus, says Kent, the Constitution has effected the separation of powers "with great felicity of execution, and in a way well calculated to preserve the equal balance of the government."

A close examination of the Constitution, however, shows that the men who framed it were unable to maintain the purity of the principle when they came to prescribing the mode of exercising the powers of government in detail. Indeed, it was thoroughly understood by the framers that a complete separation of powers was impossible, save in the realm of pure theory.

The appointing power of the President is shared by the Senate; so is his treaty-making power. Owing to the amount and variety of executive business, the President must function through departmental offices, and these are created and to some extent controlled by Congress. On the other hand, the President shares in legislation through his veto power and his right to send as many messages as he chooses. Even the Supreme Court which is created by the Constitution lies at the mercy of Congress, for Congress may prescribe the number of the judges and fix their salaries subject to certain restrictions. It might, for instance,

"Er setzt ihn Rotteck an die Seite: dieser habe die Lehre des Contrat Social durch einige Begriffe des monarchischen Staatsrechts verdünnt, Sièyés das Feuer der Rousseauschen Volkssouveränität mit dem Wasser der Montesquieuschen Gewaltenteilung verschmolzen" Zweig, *Die Lehre vom Pouvoir Constituant*, p. 116.

[1] *Readings*, p. 50.

fail to create the requisite lower and intermediate courts, reduce the number of judges, and through the confirming power of the Senate secure pliant judges; and thus overthrow the prestige of the judiciary or make it subservient to the legislative branch.

Furthermore, political practice has shown that the influence of a department of the government depends not so much upon the legal authority which it enjoys as upon the great interests which function through it.[1] For example, during the period of Reconstruction, Congress dominated the executive, overrode his exercise of the veto power, and through the Tenure of Office Act and other measures gathered into its hands almost the whole domain of federal authority.[2] Recently the executive has come to the front as the more popular and influential branch of the federal government, although not without protests from Congress.

As a legal doctrine applied by the courts, the theory of the division of powers takes a more precise form. It was early applied in Hayburn's case relative to an act of Congress authorizing judges of the circuit courts to receive and hear certain claims to pensions, subject to the supervisory powers of the Secretary of War. The judges agreed that the power which Congress sought to confer was not judicial in its nature, and they therefore refused to serve in the capacity required by the law.[3] The judges for the district of North Carolina stated that the courts were not warranted in exercising "any power not in its nature judicial, or if judicial, not provided for upon the terms the Constitution requires." It must be said, however, that the occasions on which one branch of the federal government has by a law or order trespassed upon the domain of another branch have been few indeed, and the Supreme Court of the United States has been loath to hold acts of Congress invalid on the general theory of the separation of powers.[4]

The soundness of the theory of the separation of powers as a practical working scheme of government has been rather severely criticised recently by two eminent publicists, Professor Ford and

[1] *Readings*, p. 265, for Senator Beveridge's view of executive influence.

[2] Haines, *Conflict over the Judicial Powers*, pp. 165 ff.

[3] Supreme Court decisions: 2 Dallas, 410.

[4] See article by Professor T. R. Powell, Political Science Quarterly, Vol. XXVII, pp. 215 ff.

Professor Goodnow.[1] They hold that the functions of government are only twofold, the formulation and execution of public will, — that is legislative and executive, — the judiciary being merely a branch of the law-enforcing power. In their view the separation of powers only creates friction in the government, divides responsibility, necessitates iron-bound party machinery outside the government to overcome the unwieldiness of the system, and altogether works for confusion and obscurity instead of simplicity and efficiency. They cite the English system, in which the legislative and executive powers are fused under the direction of the Cabinet, and the judiciary cannot pass on the constitutionality of laws.

In response to this criticism, Professor Burgess contends: "I think that we are upon the right line, and that those nations which have developed parliamentary government are beginning to feel, as suffrage has become more extended, the necessity of greater executive independence. Parliamentary government, *i.e.*, government in which the other departments are subject to legislative control, becomes intensely radical under universal suffrage, and will remain so until the character of the masses becomes so perfect as to make the form of government very nearly a matter of indifference. There is no doubt that we sometimes feel embarrassment from a conflict of opinion between the independent executive and the legislature, but this embarrassment must generally result in the adoption of the more conservative course, which is far less dangerous than the course of radical experimentation. . . . The feature *par excellence* of the American governmental system is the constitutional, independent, unpolitical judiciary and the supremacy of the judiciary over the other departments in all cases where private rights are concerned." [2] This undoubtedly represents the prevailing view of American publicists and statesmen, and is at all events the fundamental doctrine of our law.

[1] Ford, *Rise and Growth of American Politics;* Goodnow, *Politics and Administration.*

[2] Political Science Quarterly, Vol. X, p. 420.

The Supremacy of Federal Law

"This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land." So runs the federal Constitution, — apparently as clear as a statement of law can be, — but it leaves unsettled the question as to the power that shall decide what laws of the United States are duly made in pursuance of the provisions of the Constitution and what state laws are in conflict with the superior law. This question involves the very nature of the federal Union, and for more than half a century the famous controversy over states' rights raged around it. Happily, however, it is now definitely settled, and its leading features are of historical interest only.[1] Federal law is supreme; and, in the last instance, the Supreme Court of the United States is the final interpreter of that law. The decisions of this Court are binding on Congress, the states, and private persons.

The application of this principle may be illustrated by two cases. Congress provided by law that when any civil suit or criminal prosecution was begun against a federal revenue officer in any court of a state,[2] the case could be immediately removed into the federal courts. A federal revenue officer, in the discharge of his duty, killed a man in Tennessee, and his case, against the protest of the state, was removed to a federal court in due form. In discussing the constitutionality of this law, Mr. Justice Strong said of the federal government: —

"It can act only through its officers and agents, and they must act within the states. If, when thus acting, and within the scope of their authority, these officers can be arrested and brought to trial in a state court for an alleged offence against the law of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere *at once* for their protection, — if their protection must be left to the action of the state courts, — the operations of the general government may at any time be arrested at the will of one of its members. The legislature of a state may be unfriendly. It may affix pen-

[1] *Readings*, p. 140.

[2] On account of an official act, of course.

alties to acts done under the immediate direction of the national government and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the state, but equally federal law, in such a manner as to paralyze the operations of the government. . . . We do not think such an element of weakness is to be found in the Constitution. . . . No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it." [1]

Another phase of federal supremacy is illustrated by the case involving the constitutionality of a law passed in New York fixing the hours for workmen in bakeries. The owner of a bakery contended that this law violated the principles of the federal Constitution, and on appeal to the Supreme Court his contention was upheld. Thus the state law was set aside by the superior force of the federal Constitution.[2]

Interstate Relations

The Constitution secures to the citizens of each state the privileges and immunities of the citizens in the several states, and the federal judiciary defines and enforces them by proper processes. This means that there are certain great legal rights [3] necessary to free migration throughout the American empire, to the successful conduct of business and industry, and to the enjoyment of property, which no state may take away from a citizen of another commonwealth coming within its borders. It means also that no state may confer civil rights on its own citizens and at the same time withhold those rights from citizens of other states.[4] It does not mean, however, that A. of Illinois, on moving into Indiana, may claim all privileges which he

[1] Tennessee *v.* Davis, 100 U. S. R., 257.

[2] *Readings*, p. 617; Willoughby, *The American Constitutional System*, chaps. v–x.

[3] *Readings*, p. 146, for judicial interpretation of the rights; see also the lucid discussion of the question in Willoughby, *American Constitutional System*, pp. 278 ff.

[4] *Civil* rights — rights of person and property — should always be distinguished from *political* rights — the right to vote, hold office, etc.

enjoyed in the former state; he is, on the contrary, entitled only to the rights enjoyed by citizens of the latter state. For example, A. enjoys in Illinois the right to sell cigarettes subject to certain restrictions; in Indiana the sale of cigarettes is forbidden by law; consequently A. cannot claim there the privilege which he had in the former state.

A concrete illustration is afforded by the case of Ward *v.* Maryland.[1] By a law passed in 1868 the Maryland legislature provided that persons not permanent residents in the state must take out licenses before offering for sale, within certain districts, goods not manufactured within that commonwealth. Ward, the plaintiff in the case, was a resident of New Jersey, and, without procuring a license, he sold within the prohibited district goods not manufactured in Maryland. He was accordingly arrested for violating the law, but set up the contention that the law of Maryland was in contravention of the federal Constitution. When the case came before the Supreme Court of the United States, it was held that the statute in question was "repugnant to the second section of the fourth article of the Constitution, which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[2]

To facilitate intercourse among the several states, especially in the transaction of legal business, the Constitution provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. Congress has provided by law the form in which such acts and proceedings shall be authenticated, and has ordered that, when so authenticated, "such faith and credit shall be given them in every court within the United States as they have by law and usage in the courts of the state from which they are taken." This provision works out in the following way. A. brings suit against B. in a court in Ohio, of which state they are both residents; and, after trial, the Ohio court decides that B. owes A. $1000 and gives judgment accordingly. B. thereupon moves into New York, taking his property along, before it can be attached for the debt. When A. in quest of his money goes after B. into New York, it is not necessary that the case should be

[1] Ward *v.* Maryland, 12 Wallace, 418.

[2] Willoughby, *op. cit.*, pp. 280–281; *Readings*, p. 146.

tried again in order to get the proper process to recover his money. All he has to do is to show in the New York court of proper jurisdiction the authenticated judgment of the Ohio court. B. may contend that the records are not authentic, or the court that rendered the first judgment did not have jurisdiction, but he cannot secure a reopening of the case on its merits.[1]

The extradition of criminals, long an international practice based on treaty stipulations between independent countries, was carried over into the federal Constitution by the provision that any person charged with crime, fleeing from justice and found in another state, shall be delivered up on demand of the executive authority of the state from which he fled to be removed for trial in the state having jurisdiction of the crime. Congress has amplified the constitutional provision by an act declaring that on the demand from the proper authority, "it shall be the duty of the executive authority of the state" to cause the fugitive to be seized and handed over to the agent of the state making the requisition. The words "it shall be the duty" were interpreted by Chief Justice Taney as merely declaratory of a moral duty, not as mandatory and compulsory. "The act," continued the Justice, "does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the Constitution which arms the government of the United States with this power." The governor of a state is therefore under a moral obligation to surrender criminals, but he may use his discretion in the matter.[2]

The exact process followed in the rendition of criminals is prescribed in an Act of Congress. In addition most states have statutes providing that an accused person can be arrested upon information of the charge being received, and held until the official demand is made. Let us suppose that A. commits murder in Ohio and escapes into Indiana. As soon as his whereabouts are discovered, the authorities of the place where the offence was committed will request his arrest, and he will be taken into custody by the police or the sheriff of the locality where he is found. A regular charge will then be lodged against him in

[1] Willoughby, *op. cit.*, pp. 273 ff.
[2] See *Readings*, p. 148, for a practical example.

Ohio, if this has not been already done, either by an indictment by grand jury or an affidavit made before a magistrate. Thereupon the governor of Ohio will issue to the governor of Indiana a formal demand for the surrender of A., appending to it a certified copy of the indictment or affidavit. If the governor of Indiana finds that the papers are regular and that A. is a fugitive from Ohio and was in that state at the time that the alleged murder was committed, he will issue an order for his surrender to the agent appointed for that purpose by the governor of Ohio. A. will then be taken to Ohio and tried for the murder.[1]

Citizenship and the Suffrage

In international law, the term "citizenship" means membership in a nation, but at the time of the formation of our federal Constitution it had received no very definite connotation either in law or popular practice.[2] The Constitution, therefore, speaks of "citizens of the United States" and "citizens of the states"; but a strict usage of the term would require us to speak of citizens of the United States and residents or inhabitants of the states, although this usage might popularly be regarded as a species of pedantry. The state, however, has no power to confer or withhold citizenship, although it may, as will be seen later, confer many civil and political rights on foreigners. The exclusive right to admit aliens to citizenship is given to the federal government by the clause authorizing Congress to make uniform rules of naturalization.

Citizenship in the United States may be acquired by birth or by naturalization. All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are *ipso facto* citizens of the United States. This is called citizenship by reason of birth in a particular place, *i.e.*, *jure soli*. To secure civic rights to children born to citizens of the United States residing abroad, Congress has provided by law that all children born out of the limits and jurisdiction of the United States, whose fathers are at the time of their birth citizens thereof, shall be deemed citizens of the United States. The rights of

[1] Reference: J. B. Moore, *Extradition and Interstate Rendition.*

[2] Thayer, *Cases on Constitutional Law*, Vol. I, p. 459, note.

citizenship, however, do not descend to children whose fathers never resided in the United States.[1]

Foreigners may be admitted to citizenship by naturalization, either collectively or individually. Collective naturalization may occur when a foreign territory and its inhabitants are transferred to the United States. The manner of this naturalization is generally stipulated in the terms of the treaty of transfer. For example, the treaty with France ceding the Louisiana territory provided that the inhabitants of the territory should be incorporated into the Union of the United States and admitted as soon as possible, according to the principles of the federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States.[2]

The process of naturalizing individuals is subject, in all of its details, to the laws of Congress, and it is committed to the charge of certain specified courts.[3] Naturalization can be effected only in a circuit or district court of the United States, or a district or supreme court of a territory, or a court of record of a state having law or equity jurisdiction in cases in which the amount in controversy is unlimited, and having a seal and a clerk.[4] Only white persons and persons of African descent may be naturalized; the Chinese are excluded expressly by law, and this exclusion has been extended to the Japanese. An alien woman who marries an American citizen by that act becomes an American citizen. An American woman who marries an alien loses her citizenship.

The process of naturalization falls into three stages: (1) At least two years prior to his admission, the alien (who must be at least eighteen years of age) makes a declaration on oath before the clerk of a court stating his intention to become a citizen and renouncing his allegiance to any foreign power. (2) Not less than two years nor more than seven years after this declaration (and after five years' residence in the United States), the alien must file in his own handwriting his petition for citizenship, stating that he is not opposed to organized government, is not a polygamist, intends to become a citizen, and

[1] *Readings*, p. 150.

[2] See Moore, *Digest of International Law*, Vol. III, p. 276.

[3] Under the general supervision of the Bureau of Naturalization in the Department of Labor at Washington.

renounces his allegiance to his former country. This petition must be verified by the affidavits of two citizens certifying to the residence and good moral character of the applicant.[1] (3) After ninety days have elapsed from the date of filing the petition, the application is heard by the court. The applicant renews his adherence to the declarations made in the petition, and is then examined by the court. This examination may be formal or thorough and searching, according to the standards of the judge conducting the final hearing. Examining judges are required to satisfy themselves that all the provisions of the law have been complied with, that the applicant has behaved as a man of good moral character, is attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. When the court is duly satisfied the certificate of naturalization is issued. A large power of discrimination is thus conferred upon the court, and there are some instances of its being abused by judges personally opposed to the political principles expressed by the alien applicants.

The original constitution contained no positive provisions relating to the right to vote, but left the question to the states for solution by stipulating that voters for members of the House of Representatives should have the qualifications requisite for electors of the most numerous branch of the state legislature, and at the same time permitting the state legislatures to decide how presidential electors should be chosen.[2] Accordingly there does not exist in the United States, as in Germany, a national suffrage distinct from the suffrage of the respective states. Thus matters stood until the close of the Civil War, when the Republican party sought to secure its supremacy and enable the newly emancipated negro to protect himself against his former master by forcing the adoption of the Fourteenth and Fifteenth amendments.

The effect of these provisions, however, was not to create one uniform suffrage throughout the Union, but to leave the regulation of the matter to the states, subject to the provision that

[1] An applicant must reside at least a year in the state or territory in which he makes application. If he landed after June 29, 1906, he must present a certificate from the Department of Labor showing date of arrival, and the declaration of intention must be filed with the petition.

[2] Senators of the United States were to be chosen by the state legislatures.

"when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a state or the members of the legislature thereof, is denied to any of the male inhabitants of such states, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such states"; and to the further provision that the right of citizens to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

Notwithstanding these provisions, a uniform manhood suffrage was not established throughout the United States. In fifteen states, women are admitted to full suffrage; in others tax, educational, property, and other qualifications are imposed; and in a few states we have the peculiar anomaly of foreigners, who have announced their intention of becoming citizens, being permitted to vote for state and even national officers.[1]

The various restrictions operate in such a manner as to exclude thousands of adult male citizens, and they are by no means confined to the South. Massachusetts with an educational test, or Pennsylvania with a tax qualification, is legally quite as liable to a reduction of representation as any southern state with a property qualification in its constitution. Nevertheless, no serious attempt has yet been made to secure an enforcement of the Fourteenth Amendment.

The negative character of the former suffrage amendments to the federal Constitution was adopted by Congress in 1919 when it passed the Nineteenth Amendment providing that no citizen shall be denied the right to vote on account of sex. When this amendment is ratified, it will not in itself establish national woman suffrage, but will forbid the states to withhold the vote from women.

[1] See *Readings*, p. 143, and below, chap. xxii.

The Supremacy of the Judiciary[1]

The crowning feature of the federal system is the supremacy of the judiciary over all other branches of government in matters relating to the rights of persons and property. In no European nation, federal or centralized in form of government, is the high authority of declaring null and void the acts of other departments conferred upon a judicial tribunal. This judicial supremacy, says Professor Burgess, is "the most momentous product of modern political science. Upon it far more than upon anything else depends the permanent existence of republican government; for elective government must be party government — majority government; and unless the domain of individual liberty is protected by an independent, unpolitical department, such government degenerates into party absolutism and then into Cæsarism." [2]

It is the Supreme Court, therefore, that stands as the great defender of private property against the attempts of popular legislatures to enroach upon its fundamental privileges. This fact has been so clearly and cogently demonstrated by President Hadley that his statements deserve quotation at length. The theoretical position of property-holders, he says, — "the sum of the conditions which affect their standing for the long future and not for the immediate present — is far stronger in the United States [than in other countries]. The general status of the property-owner under the law cannot be changed by the action of the legislature, or the executive, or the people of a state voting at the polls, or all three put together. It cannot be changed without either a consensus of opinion among the judges, which should lead them to retrace their old views, or an amendment of the Constitution of the United States by the slow and cumbersome machinery provided for that purpose, or, last, — and I hope most improbable, — a revolution.

"When it is said, as it commonly is, that the fundamental division of powers in the modern State is into legislative, executive, and judicial, the student of American institutions may fairly note an exception. The fundamental division of powers in the

[1] See below, chap. xv.

[2] Political Science Quarterly, Vol. X, p. 422.

Constitution of the United States is between voters on the one hand and property-owners on the other. The forces of democracy on one side, divided between the executive and the legislature, are set over against the forces of property on the other side, with the judiciary as arbiter between them; the Constitution itself not only forbidding the legislature and executive to trench upon the rights of property, but compelling the judiciary to define and uphold those rights in a manner provided by the Constitution itself.

"This theory of American politics has not often been stated. But it has been universally acted upon. One reason why it has not been more frequently stated is that it has been acted upon so universally that no American of earlier generations ever thought it necessary to state it. It has had the most fundamental and far-reaching effects upon the policy of the country. To mention but one thing among many, it has allowed the experiment of universal suffrage to be tried under conditions essentially different from those which led to its ruin in Athens or in Rome. The voter was omnipotent — within a limited area. He could make what laws he pleased, as long as those laws did not trench upon property right. He could elect what officers he pleased, as long as those officers did not try to do certain duties confided by the Constitution to the property-holders." [1]

[1] The Independent, April 16, 1908.

CHAPTER IX

THE NOMINATION AND ELECTION OF THE PRESIDENT

THE framers of the federal Constitution intended to remove the office of chief magistrate of the Republic as far as possible from the passions and interests of the masses, and accordingly they provided for his election by a small body of electors chosen as the legislatures of the several states might determine. The original design has been upset, however, by the rise of political parties. It is, therefore, necessary to preface a discussion of the legal provisions regarding the election of the President by a consideration of the extra-legal organization which selects the candidate for whom the electors of each party are morally bound to vote.

Preliminaries to the National Convention

The national convention assembles on a call issued by the national committee. A meeting of this committee is held usually five or six months before the time for making presidential nominations. At this preliminary meeting, summoned by the call of the chairman, the place at which the coming convention is to be held is selected after the representatives of various cities have presented their claims, and the date for the opening of the great party assembly is fixed. When the national committee has thus decided upon the place and date of the convention, it issues a call to the party members and supporters inviting them to choose delegates and alternates, so that the party conference may be a representative body.

On the eve of the convention, the national committee assembles to complete preparations. At this session, the programme of proceedings is determined upon and the temporary roll of delegates is made up from the returns from the proper officers in the states and districts.

The national convention is composed of delegates from the states and territories. In the Democratic convention each state

is allowed two delegates for each of its Senators and Representatives in the Congress of the United States. For example, New York has two Senators and forty-three Representatives — forty-five in all — and it is entitled to ninety members in the Democratic convention. The four delegates corresponding to the representation of the state in the United States Senate are known as delegates-at-large, and the others are called district delegates.

It should be noted that this rule takes no account of the strength of the party in the various sections of the country. It was formerly applied by the Republican party with the result that a southern state having only a handful of Republican voters would have the same strength in the party convention as a solid Republican state of the same population in the North. The use of the federal offices in the South by Republican Presidents to control party conventions led to a reform in 1914. The Republican convention now consists of four delegates-at-large from each state and from each congressional district at least one delegate with one additional delegate if the district polls 7500 Republican votes or more.

In prescribing the methods of electing delegates, the calls of the Democratic and Republican parties differ fundamentally. The former regards the state as the unit of representation, but will in the future require the choice of the delegates at primaries. The Republican party, on the other hand, definitely stipulates that the delegates-at-large shall be chosen at the state convention and the other delegates at congressional district conventions. Special provisions are made for the territories, and for the states that prescribe nomination by direct primaries.

In addition to the extensive choice of delegates to the conventions by direct primaries, a new feature was introduced into the campaign of 1912 in a few states, including Massachusetts, New Jersey, Illinois, Nebraska, Oregon, and Wisconsin. In those states the voters of each party were allowed to express at the primaries a preference as to the several aspirants for the presidential nomination, and the delegates (chosen by direct vote) were instructed to record at their respective conventions the preferences of their constituents.

The purpose of the national convention is threefold. It formulates the principles of the party into a platform on which the appeal is made to the voters during the ensuing campaign.

It nominates candidates for the presidency and the vice-presidency, and appoints committees to notify both nominees. Finally it organizes a new national committee charged with carrying on the campaign and acting for the party for four years — until the next national convention is held.

The National Convention at Work

The convention usually assembles in some enormous building where the thousand delegates, and perhaps eight or ten thousand spectators, are seated. Each delegation is arranged around the banner of its state, and has a chairman to direct its part in the convention. Some of the more important delegations are accompanied by brass bands, and often carry curious symbols and transparencies. In the audience are usually gathered the most active politicians who are not serving as delegates, enthusiastic partisans from all over the country, and interested visitors attracted by the spectacular affair. It is indeed a cool-headed politician who is not swept off his feet by the excitement of the hour. Bands play popular airs; party heroes are greeted with prolonged cheering as they appear on the scene; wire-pullers rush here and there among the delegations making and extracting promises; all are apparently intoxicated with enthusiasm and boisterous party zeal.

The convention is called to order by the chairman of the national committee,[1] and before any business is transacted, prayer is usually offered. Clergymen from different congregations are chosen for the several sessions, so as to avoid offending religious susceptibilities. The first business is the reading of the call for the national convention by the secretary of the committee, and the chairman then puts in nomination the temporary officers, who have been selected by the committee before the meeting. Usually these nominations are accepted without question, for the business of the temporary organization is largely formal. The temporary chairman, it is true, makes an address appropriate to the occasion, which is often regarded as the "keynote" to the proceedings, but he is not called upon to make any important decisions from the chair which may affect either the platform of

[1] The order of business, of course, varies from time to time in details, but this general description is substantially true of all conventions.

the party or its nominations. When the temporary officers are duly installed and the speech of the chairman is delivered, the rules of the previous convention are adopted until the permanent organization is effected. The first day's session is then concluded by calling the roll of the states and territories, each one of which appoints one member for each of four great committees of the convention: the committee on credentials, the committee on permanent organization, the committee on rules and order of business, and the committee on resolutions or platform.

After the second session of the convention is called to order by the temporary chairman, the reports of the various committees are heard, not necessarily in any fixed order. The committee on credentials is charged with the important work of deciding questions of contested seats. All notices of contests between delegations are filed in advance with the national committee which makes up the temporary roll. These documents relative to the several disputes are passed on to the credentials committee, which holds meetings and prepares reports for the convention. Sometimes these contests are very exciting; for the policy of the party on national issues and the fate of candidates may be decided by the admission or rejection of certain delegations. Generally speaking, however, the report of the majority of the committee on credentials is accepted by the convention.[1]

The next important report is that of the committee on permanent organization, which names the permanent chairman, the secretary, and other officers of the convention. This report is also generally approved without debate, although, of course, the convention may, if it sees fit, refuse to accept the nominees of the committee. The permanent chairman is duly installed, makes a long speech, and is presented with a gavel. The rules, under which he controls the assembly, are reported by the committee on rules, and are, in principle, those of the House of Representatives with some modifications. The chairman is constantly called upon to decide points of order of a highly technical nature; he must prevent the convention, which sometimes bursts out into storms of applause lasting more than an hour, from degenerating entirely into an uncontrolled mob;

[1] It sometimes happens that, to avoid open rupture, both delegations from a state are admitted — each member having one-half of a vote.

he is often compelled to choose from among five or ten speakers trying to get the floor at the same time; and it is, therefore, important that he should be master of the rules of procedure, and capable of prompt and firm decision.

On the second or third day, the convention is ready for the report of the committee on resolutions, which is charged with drafting the platform. This committee begins its sessions immediately after its appointment, and usually agrees on a unanimous report, but sometimes there is a minority report. The platform is not often a statement of the particular things which the party proposes to do if it gets into power; it is rather a collection of nice generalities which will serve to create good feeling and unite all sections around the party standard. It usually contains, among other things, references to the great history of the party, interspersed with the names of party leaders, and denunciations of the policies and tactics of the opposite party. Frequently a platform will refer to matters that do not concern American politics primarily, such as the persecution of the Jews in Russia or the struggle of Ireland for home rule. Such resolutions do not imply that the government can or will do anything positive on such matters, but they serve to appeal to the imagination and sympathies of certain classes of voters. The report of the committee on resolutions seldom meets opposition in the convention, for care is taken by the committee to placate all elements. It is only when there is some very contentious matter, such as the free silver issue in 1896, that there is likely to be a divided report from the committee or any debate on the floor.

After the adoption of the platform, the new national committee is chosen.[1]

About the third or fourth day, the chairman announces that the next order of business is the calling of the roll of the states for the presentation of names of the candidates for President of the United States, and the roll is called in alphabetical order beginning with Alabama. If a state has no candidate to present, it may defer to another further down on the list. When Alabama is called upon in the Republican convention, the chairman of the delegation will say something to this effect: "The State of Alabama requests the privilege and distinguished honor

[1] See below, p. 173.

of yielding its place upon the roll to the State of New York." A representative of the state which is thus named thereupon places a candidate in nomination, in a speech full of high-sounding phrases and lofty sentiments.[1] The first speech may be followed by speeches seconding the nomination, from the representatives of various delegations scattered over the House, if the chairman sees fit to recognize them. The nominations may be closed without calling the full roll of the states, or the calling of the roll may be resumed and each state heard from, as it is reached in regular order.

When the nominations are made, the vote is taken by calling the roll of the delegations, and the chairman of each announces the vote of his group. According to the theory of the Republican party, each member of a delegation may cast his vote as he pleases, although as a matter of fact the delegations are often instructed by the conventions of the states from which they come. The Democratic party, however, does not recognize the right of the individual to vote as he pleases in the convention. It not only permits the state convention to instruct its delegates, but also authorizes the majority in each delegation to determine how the entire vote shall be cast — and cast that vote as a unit.[2] For example, the state of New York has ninety representatives in the national convention, and if forty-six of the delegates agree on the same candidate, the vote of the entire number is cast for him, when the unit rule is applied.

This practice, which is called the application of the "unit rule," is justified by Democratic leaders on the ground that the state, not the congressional district, is the unit of representation; and that greater weight is given to the delegation of a state, in negotiating with the other delegations, by reason of the fact that it can cast the entire number of votes. That is, on account of his ability to deliver the entire vote of the New York delegation, the leader of that state, for example, is able to demand more consideration in the distribution of political favors than if he could only deliver a portion of the vote. The unit rule, therefore, gives more power to the organization of the state than the system of allowing divided delegations. It should be noted, however,

[1] See *Readings*, p. 164, for an extract from a nominating speech.
[2] The preference primary changes this rule. Above, p. 167.

that the unit rule is not applied to all state delegations in the Democratic convention. It is left to the states concerned to adopt or reject the principles as they see fit; but if the state does not act in the matter, the delegates may vote as they please.

When the roll of all the states and territories has been called, and the vote of each one has been registered by the tally clerks, the total result is announced. If any nominee in the Republican convention receives a majority of all the votes cast, he is thereupon declared the candidate of the party for the presidency of the United States. In the Democratic convention, however, it is an inflexible rule that the successful nominee must receive a majority of two-thirds. This practice has long been associated with the unit rule and in a way offsets the effects of that rule. If no nominee receives the requisite majority on the first ballot, the process is repeated until some one secures the proper number of votes. It is the practice of both parties, immediately after the nomination of the presidential candidate, to nominate the candidate for Vice-President in the same manner.

When the convention has chosen its candidates, a separate committee is appointed to convey to each of them a formal notification. Shortly afterward the notification committee waits upon the candidate, and through an official spokesman announces the will of the party. The candidate thereupon replies in a lengthy address, and sometimes follows this by a special letter of acceptance. The acceptance speech is often an important campaign document for the reason that the candidate may interpret the platform of his party in his own way, going even so far as to modify the spirit, if not the letter, of that pronunciamento. For example, Mr. Taft in his acceptance speech of 1908 elaborated at length the Chicago platform and committed himself personally to many doctrines which had not been specifically endorsed at the convention which nominated him.

The National Committee

The great work of directing the campaign is intrusted to the national committee,[1] composed, in the Republican and Democratic parties, of one member from each state and territory

[1] In practice, the burden falls upon the officers and an executive committee of the national committee.

chosen by the respective delegations to the national convention, and holding office for four years, that is, from one national convention to the next. The selection of this committee, as we have seen, is a part of the regular convention proceedings. Usually on the second or third day, after the adoption of the platform and before the nomination of the candidates, the permanent chairman of the national convention announces that the next order of business is the calling of the roll of the states and territories for the presentation of names of persons chosen to serve on the national committee. In common practice the secretary of the convention has in advance a full report of the names of the members chosen from each state and territory, and this report being read to the convention is accepted as it stands, unless objections are made from the floor. The national convention, as such, therefore, does not exercise any control over the choice of members of the national committee. In 1912, the Democratic convention ordered the election of the future committeeman in each state at party primaries.

The principal officers of the national committee are the chairman, secretary, and treasurer. The chairman, who is by far the most important political leader in the national organization, is the choice of the candidate for President. The wishes of the committee and other leaders of the party, are, of course, taken into consideration. This power of selecting the chairman is very important to the presidential nominee, because the immediate task of that officer is to conduct the presidential campaign, and it is essential that he and the candidate work together in complete harmony. The chairman is not necessarily a member of the original committee, for it may so happen that no prominent and energetic organizer has been chosen by the state and territorial delegations. The secretary and treasurer are sometimes appointed by the chairman, and sometimes by the committee. The treasurer is often not a member of the committee; owing to his important position as collector of campaign funds, he is selected for his financial ability and influence from among the most available members of the party. Of course, it is impossible here to lay down any absolute rules in regard to the way in which officials of the committee are chosen, for the choice is not determined under any written or unwritten law, but is left for adjustment according to circumstances.

The National Campaign

Immediately after the adjournment of the convention, the newly elected committee meets and proceeds with the preparations for the campaign. The leadership in this great national contest is taken of course by the chairman,[1] who disburses enormous sums of money collected by the treasurer, directs the huge army of speakers, organizers, and publicity agents scattered over the Union, and as the day of election approaches surveys the whole field with the eye of an experienced general, discovering weak places in his battle array, hurrying up reënforcements to the doubtful states, and, perhaps, pouring an immense sum of money into districts where large numbers of wavering voters may be brought into line. The outcome of the campaign, therefore, depends in a great measure upon the generalship of the chairman of the national committee.

Quite as important as the general who leads the army in the field, is the organizer of the department which furnishes the sinews of war. Consequently, in a political campaign, the treasurer of the national committee takes a prominent place by the side of the chairman. It is his business to discover innumerable ways of raising the million dollars or more required to wage the great political contest.[2] In this work he is, of course, greatly assisted by the issues of the campaign; for, when large business interests are liable to be affected by the outcome of the election, he can appeal with special force to those whose fortunes are linked to the fate of his party. It is, therefore, apparent why the treasurer of the national committee should be a financier of peculiar genius, and a man influential in wealthy circles; and for this reason an eminent business man is usually chosen to fill this high post.

The campaign of 1888 affords a remarkable example of the intimate relation between the finances of a party and the interests affected by the outcome of the election. Moreover, a very frank statement made by the treasurer for that year, Mr. Wanamaker, gives us an insight into his reasons for undertaking the management of Republican finances, and the methods which he

[1] *Readings*, p. 169.

[2] According to official statements, the Republican national committee raised $1,035,368.27 in 1908 and the Democratic committee $620,150.

employed.[1] Mr. Wanamaker, according to his own account, had had large experience in raising money for the Young Men's Christian Association and other similar organizations; and accordingly he knew how to bring arguments to bear upon large-minded men. The strong pronunciamento in favor of free trade, made by Mr. Cleveland in a message to Congress, had frightened business men engaged in industries fostered by the protective tariff, and of this situation Mr. Wanamaker was quick to take advantage. He said it was his custom to address business men as follows: "How much would you pay for insurance upon your business? If you were confronted with from one year to three years of general depression by a change in our revenue and protective measures affecting our manufactures, wages, and good times, what would you pay to be insured for a better year?" The argument was peculiarly effective, for money was raised in such large amounts that the Democrats were completely outwitted; and when election was over, the national committee, according to Mr. Wanamaker's statement, was ready to make him almost any offer. He chose the office of Postmaster-General, and entered the Cabinet of the President whom he had done so much to elect.

A second instance of powerful support given by financial interests to a political party is afforded by the campaign of 1896, when the question of free silver was the leading issue. Bankers, men of finance, creditors, and business men generally, believed that the adoption of free coinage of silver at the ratio of 16 to 1 would be absolutely disastrous to them. Accordingly, they rallied to the support of the Republican party. On March 23, 1896, before the conventions of the two parties met, the American Bankers' Association sent out a letter to the bankers of the United States, declaring unequivocally in favor of the maintenance of the existing gold standard, and recommending to all customers of banks the exercise of all their influence, as citizens in the various states, to secure the selection of delegates to the political conventions of both parties, who would stand squarely in favor of the gold standard.

After the conventions were held, and the two great parties were divided on the money question, a committee was appointed to

[1] The Forum, Vol. XIV, pp. 29 ff.

solicit funds in aid of the campaign for the Republicans. In a circular letter sent out in September, this committee stated that the banks in New York and some other places had been contributing on a basis of one-fourth of one per cent of their capital and surplus; and urged other banks to follow this example, on the ground that it was proper and legitimate for the banks to make political contributions in a campaign so vital to all financial institutions.[1]

The actual methods employed by the parties in influencing voters vary of course from time to time; new expedients for attracting the attention of the people are constantly being devised. Nevertheless, we can draw from a study of the methods of recent campaigns certain general practices which the parties adopt to accomplish their ends.

The first important step in the campaign is the location of the party headquarters from which the contest is to be directed. The strategic value of putting the centre of the campaign near or in the doubtful states was recognized by the Republicans in 1896, when they selected Chicago as the point from which the militant forces in the field were controlled. It is not always the rule, however, to maintain one centre, for in the campaign of 1900 the Republicans divided their national headquarters into two branches — one at New York and one at Chicago.

Since the chief work of the national committee in carrying on the campaign is to influence the minds of the voters, its attention is given in a very systematic way to the preparation of the campaign literature. As soon as the issues of the campaign are pretty well settled, each party publishes a campaign text-book, which usually contains the platform, notification and acceptance speeches, biographical sketches of the candidates, statistics on business, tariff, trusts, money, and other economic issues, addresses by prominent leaders, papers in defence or criticism of the administration, and the most cogent arguments which the party can advance in support of its position. The campaign text-books are sent out in large quantities, not to the public generally, but especially to the newspapers, speakers, and others

[1] The evidence for these statements is in the *Congressional Record*, Vol. XL, part vi, pp. 5366 ff. In 1907 Congress passed an act forbidding corporations to make contributions to campaign funds in federal elections.

in a position to influence voters by argument. In addition to the regular campaign text-book there is usually a text-book issued by the congressional committee [1] which contains additional information on the "records" of the parties and their policies.

These central pieces of campaign literature are supplemented by innumerable pamphlets, leaflets, posters, cartoons, and congressional speeches, printed in every language that is represented by any considerable number of voters. A regular bureau of printing and publication under the supervision of an expert directs this enormous "literary" output, which is distributed broadcast, very often through the state central committees. It was estimated that the Republican committee in 1896 sent out about 20,000 express packages, 5000 freight packages, and probably half a million packages by mail.[2]

A far more effective way of reaching the public at large is through the newspaper. Thousands of the uninteresting documents sent out by the national committee are doubtless thrown away unopened or unread, and there must be an enormous waste of this branch of the campaign work. The newspapers, however, which have regular readers, reach the public more directly; and accordingly the national committee does all that it can through the established newspapers, from the great city daily with its huge editions, down to the rural weekly with a circulation of five hundred printed on a hand-press. It was estimated that the Republican national committee, in 1896, reached five million families every week with newspapers containing Republican arguments.[3]

In addition to the printed arguments addressed to the people, there are oral arguments made by campaign speakers. The national committee generally has a bureau of public speakers which prepares a list of available orators by testing applicants and drafting volunteers, and directs the speakers in the field by placing them in positions where their special talents may be most effective. These orators are of every rank, from the man with the strong voice who can harangue a crowd on the street corner, to the finished speaker whose very name will draw thousands.

[1] See above, p. 133.

[2] Review of Reviews, Vol. XIV, pp. 533 ff.

[3] For this topic and an excellent account of the campaign of 1896, see *Readings*, pp. 171 ff.

Hundreds of these speakers are directed from headquarters, and thousands of local volunteers are enlisted by state and county committees, sometimes in consultation with the authorities higher up. Itineraries are laid out, halls and bands engaged, parades organized, and every step taken to make the oratorical effort of the greatest possible effect. According to one estimate, for several weeks before the election of 1900, seven thousand Republican speeches were made every week day and night.

Sometimes the presidential candidates themselves enter the lists. Mr. Bryan, for example, in 1896, toured the United States in a private car, delivering no less than four hundred reported speeches in twenty-nine different states, thus making undoubtedly the greatest oratorical record of any candidate up to that campaign. Sometimes the candidate does not travel about, but contents himself with remaining at home and addressing crowds that are brought from far and near on railway excursions. In this way, Mr. McKinley did effective work at his home in Canton, Ohio, in 1896. In 1908 Mr. Taft is reported to have journeyed 18,500 miles and to have made 436 campaign speeches in thirty different states; and Mr. Bryan at least equalled his first record. In 1912 Mr. Roosevelt and Mr. Wilson made long speaking tours and in 1916 Mr. Hughes made a transcontinental campaign journey which was supplemented by an extensive tour on the Pacific Coast.

A very practical and indispensable part of the national committee's work is the polling of doubtful states. Early in the campaign a political census is taken of those states in which the vote has been known to vacillate from campaign to campaign, and great pains are taken to make this census complete and accurate by sparing no cost in selecting and paying reliable and efficient canvassers. Thus the party has a fairly accurate knowledge of the number of votes upon which it can rely, and also a fairly accurate list of the number of doubtful persons whose votes may be influenced by various means. With the results of this great political census of the uncertain states in its hands, the national committee is very much in the position of a military staff, on the field of battle, which is acquainted with the numerical strength of the opposing army, the weak points in its equipment and defence, and the necessary lines of advance for winning victory. The effective means for influencing the several categories

of doubtful persons are immediately despatched to the scene of action. Two weeks before election day in 1896, the Republicans, fearing the loss of Iowa, made a canvass of every doubtful voter in that state, by sending a zealous and tactful Republican to each one. This detailed and effective canvass is reported to have cost over $200,000.[1]

It is indeed a marvellous contest that closes on the day when the ballots of millions of voters are cast for the presidential electors in the several states.[2]

Casting and Counting the Electoral Votes

The political activities described above — important as they are in the selection of the President and Vice-President — are wholly unknown to the Constitution. That document, in fact, contains but very few clauses with regard to the actual choice of the President and Vice-President.[3] In the first place it contemplates a system of indirect election: each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the number of Senators and Representatives to which the commonwealth is entitled in Congress. To remove the electors from any direct contact with the federal government, it was added that no Senator or Representative or a person holding any office of trust under the United States should be appointed an elector.

It is to be noted that the electors of each state are to be chosen as the legislature thereof may determine. In the course of our history no less than three distinct methods have been devised. (1) In the beginning, it was often the practice for the state legislatures to choose the electors; but within a quarter of a century the majority of them had abandoned this practice in favor of popular election. (2) Where this more democratic system was adopted it was often the custom at first to have two electors chosen by the voters of the state at large and the remaining electors chosen by congressional districts — thus each voter would have the right to vote for three electors, two at large and one from

[1] World's Work, Vol. I, p. 77.

[2] The Tuesday following the first Monday in November was fixed by Congress in 1845.

[3] *Readings*, p. 154.

his own district.[1] (3) It was at length discovered that a state's influence in national politics was greatly increased if all of its electors could be carried by one party or the other, and consequently the system of election by district has been abandoned, in favor of election by general ticket throughout the state at large.[2]

It is necessary, accordingly, for each party in each state to prepare a list of candidates equal to the total number of electors to which that particular commonwealth is entitled. In practice, the presidential electors are generally chosen by the state convention of the party, and very often the office of elector is regarded as a titular honor to be given to distinguished citizens or to partisans willing to make liberal contributions to campaign funds.

On election day, therefore, the voter[3] does not vote directly for President and Vice-President, although for his information the names of the candidates of all parties appear on the ballot. On the contrary, if he votes a straight ticket, he simply votes for the entire list of electors put forward by his party. There is no point at all in splitting the vote for presidential electors, unless there is a fusion, such as existed for example in some of the western states between the Democrats and Populists whereby each of the two groups was to have a certain share of the electors according to a predetermined arrangement. What happens, therefore, on a general presidential election day is the choice in each state of a certain number of presidential electors — 531 in all. Normally the party which secures a plurality of votes in any state is entitled to all of the electoral votes of that state for President and Vice-President, no matter how large the minority.[4] No elector would dare to break faith with the party which placed him in nomination, and vote for the candidates of the opposite party. Consequently, the deliberative, judicial, non-partisan

[1] "In 1824, twenty-four states took part in the election. In six, the electors were chosen by the legislatures and in eighteen by popular vote, and of these in thirteen by general ticket and by districts in five. . . . South Carolina continued the practice of legislative appointment until 1860." Finley and Sanderson, *The American Executive*, p. 332.

[2] In 1892 Michigan temporarily reverted to the district system. See *Readings*, p. 157.

[3] On the suffrage, see below, chap. xxii.

[4] There have been a few instances of split electoral tickets — California and Kentucky in 1896 and Maryland in 1908, for example.

system designed by the framers of the Constitution has been overthrown by party practice.

It is sometimes held that through this party practice we have secured popular election of President and Vice-President, but if we mean by popular election, choice by majority or plurality vote throughout the United States, it has not been attained as yet. Indeed, several of our Presidents have been elected by a minority of the popular vote. Mr. Lincoln, for example, was chosen President in 1860 by a vote of 1,866,452 against a total of 2,815,617 polled by all of his opponents — the large opposition vote being so divided and distributed as to elect less than a majority of the total number of electors. And two Presidents, Hayes and Harrison, did not even receive a plurality.

This possible contingency of election by a minority of the popular vote cast is due to the fact that when a party carries a state, no matter by how slight a margin, it secures all of the presidential electors to which that commonwealth is entitled. A party, therefore, that wins, although by narrow margins, in a sufficient number of states to obtain a majority of the electors may in fact poll a smaller number of votes than the opposing party which may have carried its states by enormous majorities.

The practice of giving the entire electoral vote of a state to the party that has won at the polls, even by the slightest majority, has another significant effect. It concentrates the campaign principally in the states that are counted as "close" and are liable to swing to either party in the election. The importance of carrying these pivotal states leads campaign managers to employ in each of them every art of winning votes known to practical politics. For example, the narrow margin of 1,149 votes in New York, in 1884, gave that state to Mr. Cleveland instead of Mr. Blaine, and changed the result of the presidential election. The Republican national chairman in the campaign of 1888, remembering the lesson of the preceding election, threw a force of detectives in New York City to check false registration and illegal voting, with results which more than exceeded his expectations. This concentration of the campaign in the pivotal states has many bad features, especially the lavish use of money for questionable purposes. It is a notorious fact that in the states in which the rivalry between the parties is keenest, there is the largest amount of bribery. On the other hand, the system

works for "cleaner" politics in states where one party is certain to win, since no advantage can come from piling up votes.

The methods by which the electors so chosen in each state shall meet and cast their votes are prescribed in the Constitution and in federal and state statutes. It is provided by federal law that the electors of each commonwealth shall convene on the second Monday of January, immediately following their appointment at such place as the legislature of the state may direct — in practice, the state capital. When they have assembled, the electors vote by ballot for President and Vice-President, "one of whom at least must not be an inhabitant of the same state with themselves" — that is, for the two candidates, nominated by their party; and they thereupon make distinct lists of the number of votes so cast, and sign, certify, seal, and transmit the lists to the president of the Senate of the United States. With the lists of their votes for President and Vice-President, the electors must transmit their certificates of election as evidence of their power to act — evidence of crucial importance in case of contested elections. When they have cast their votes and transmitted their documents according to law, the electors have performed their whole duty. They are not paid by the federal government, but are regarded as state officers, and must look to the state legislature for remuneration for their services.[1]

The counting of the total electoral vote polled throughout the United States[2] begins in the Hall of the House of Representatives on the second Wednesday in February, following the meeting of the electors in their respective states. It is conducted in the presence of the Senate and the House of Representatives with

[1] *Readings*, p. 160.

[2] The constitutional clauses relative to counting the electoral vote do not provide for cases of disputed returns from the several states, and in 1876 a grave crisis arose on account of frauds and irregularities in several of the commonwealths. The Senate was Republican and supported the Republican candidate, Mr. Hayes; and the House was Democratic and favored the Democratic candidate, Mr. Tilden. A deadlock occurred and Congress found a way out by creating an electoral commission of five Senators, five Representatives, and five Supreme Court Justices. On all important matters the eight Republicans on the commission voted together, and declared Mr. Hayes elected. See P. L. Haworth, *The Disputed Election*. In 1887 Congress, by an act, provided for settling such disputes. For the details, see the act in Stanwood, *Presidential Elections*, p. 453.

the president of the Senate in the chair. Two tellers are appointed by the Senate and two by the House of Representatives. The certificates and documents are opened by the president of the Senate, taking the states in alphabetical order beginning with Alabama, and thereupon handed to the tellers who read the same and list the votes. The candidates having the greatest number of votes for President and Vice-President respectively, if such number be a majority of the whole number of electors appointed, are declared duly elected. Except in case of a contested election, this count is, of course, merely an impressive formality, for the result is ordinarily known three months before.

In case no candidate for President receives a majority of all the electoral votes cast, the House of Representatives thereupon chooses the President by ballot from the three candidates who have received the highest number of votes. It should be noted, however, that, in selecting the President, each state represented in the House is entitled to only one vote; a quorum consists of the members from two-thirds of the states; and a majority of all the states is necessary to choice. Accordingly, the vote of each state for the presidential candidate must be determined by the majority of the Representatives of the commonwealth in the House. In case of the failure of the House to choose a President (whenever the election devolves upon that body) before the fourth of March following, it becomes the duty of the Vice-President to act as President.

There have been only two instances of presidential elections by the House of Representatives — Jefferson in 1801 and J. Q. Adams in 1825. This is due, of course, to the fact that we have two great political parties somewhat equally balanced. If the voters were broken into several parties the election would almost invariably devolve upon the House.

Whenever no candidate for Vice-President receives a majority of all the electoral votes, the election is thrown into the Senate, and the Senators voting as individuals must choose the Vice-President from the two candidates having the highest number of votes. Two-thirds of the whole number of the Senators constitute a quorum for this purpose, and a majority of the whole number is necessary to a choice.

The qualifications for President are stated in the Constitution.

He must be a natural-born citizen, at least thirty-five years old and must have been fourteen years a resident within the United States. The same qualifications apply to the Vice-President. The term is fixed at four years, and so far as the Constitution is concerned, the President or Vice-President may be reëlected indefinitely.[1]

To these constitutional requirements, a third has been added by political practice: no person is eligible to the office of President for more than two terms, at least, in succession. This "third term doctrine," as it is called, is supposed to rest upon the example set by Washington in declining reëlection at the expiration of eight years' service. Tradition has it that Washington acted on principle, but this seems to have slight historical foundation.[2] He did not share Jefferson's decided ideas on rotation in office, and there is apparently no reason for believing that he objected to a President's serving three terms or more. In fact, his farewell address is filled with reasonable excuses why he in particular ought not to be charged with lack of patriotism or neglect of duty in refusing to serve for another term. Jefferson originally believed that the President should have been given a seven years' term, and then made ineligible for reëlection.[3] Later, however, he came to the conclusion that service for eight years with the possibility of removal at the end of four years was nearer the ideal arrangement. He, accordingly, followed the example set by Washington, and thus the third term doctrine early received such high sanction that it became a political dogma almost as inviolable as an express provision of the Constitution.

The question was raised anew in 1912 in the case of Mr. Roosevelt, but his supporters urged that his candidacy was only for a second "elective term." The Democratic platform pledged the party and the candidate to a single term and promised a constitutional amendment to that effect.

[1] In case of the death or resignation of the President, the Vice-President succeeds. By statute Congress provided, in 1886, that in case of the death or resignation of both the President and Vice-President the following officers shall serve, in the order mentioned: Secretary of State, of the Treasury, of War, the Attorney-General, the Postmaster-General, the Secretary of the Navy, and of the Interior.

[2] R. S. Rantoul, in The Essex Institute Historical Collections, Vol. XXXVII, p. 321 (1901).

[3] *Readings*, p. 70.

The Inauguration

It was formerly the practice for Congress, after having made the official count, to select a committee for the purpose of notifying the new President of his election, but this was not uniformly followed, and has now been abandoned altogether. Curiously enough no official notice whatever is given to the President-elect. He is supposed to be sufficiently aware of the fact himself, and on the fourth of March he appears to take the oath of office. He usually arrives in Washington a few days before, and calls upon the retiring President, to pay his respects. On the day of inauguration, the President-elect, in charge of a committee on ceremonies, is conducted to the White House, whence, accompanied by the President, he is driven to the Capitol. Unless the weather prevents, the oath of office, administered by the Chief Justice of the United States, is taken in the open air upon the platform built for the special purpose at the east front of the Capitol.[1] Following the example set by Washington, it is the practice of the President to deliver an inaugural address setting forth his policy. After the administration of the oath of office, the new President is driven back to the White House, where, from a reviewing-stand, he surveys a long procession, which is usually hours in filing past.

As soon as the new President has been installed, he is confronted with the problem of selecting his Cabinet and of filling a large number of minor places which are either vacant or whose occupants are ousted for one reason or another.[2] It is quite common for the President to select for the post of Secretary of State the member of his party who is generally deemed to be next to himself in the esteem of the country. For example, Mr. Lincoln called to the State Department Mr. Seward, who had been his chief rival for nomination at the convention of 1860 in Chicago. Sometimes the new President rewards with Cabinet positions the men who have been especially prominent in securing his election. For example, Mr. Harrison appointed Mr. John Wanamaker, who had been treasurer of the Republican campaign

[1] If the weather prevents the open-air ceremony, the oath is taken in the Senate chamber.

[2] Of course, many appointments are decided upon long before inauguration.

committee, to the office of Postmaster-General; and Mr. Taft rewarded with the same office Mr. Hitchcock, who was chairman of the national committee during his campaign. Mr. Wilson in 1913 selected as Secretary of State Mr. Bryan who had been three times the Democratic candidate for President and next to the President was the most influential leader in the party. Though as a rule the President confines his appointments to members of his own party, he sometimes chooses members of the opposition who have been lukewarm in their political activity. Furthermore, in making appointments to Cabinet positions, the President usually attempts to have the different parts of the country fairly well represented. In all cases, he is supposed to select men with whom he can work harmoniously and who are willing to carry out the main lines of his policy. While the Cabinet officer's nomination must be confirmed by the Senate, as a matter of practice, the Senate always accepts the President's selection, so that in a very peculiar sense the Cabinet may be regarded as his personal retinue on whom he can depend for coöperation and advice in making his administration successful.[1]

[1] For interesting observations on the Presidency and the character of Presidents, see Bryce, *American Commonwealth*, Vol. I, pp. 69–84.

CHAPTER X

THE POWERS OF THE PRESIDENT

THE functions of the President are prescribed by the Constitution, but his real achievements are not set by the letter of the law. They are determined rather by his personality, the weight of his influence, his capacity for managing men, and the strength and effectiveness of the party forces behind him. As chief executive, he operates through a vast and complicated official hierarchy centering at Washington and ramifying throughout the great American empire and even into foreign countries through the diplomatic and consular services. As political leader he may use his exalted position to appeal to the nation — to sectional, class, or group interests; he may use his veto power against laws passed by Congress, he may agitate by means of his messages, and he may bring pressure to bear in Congress and within his party through the discriminating use of the federal patronage. Thus it happens that we do not have the whole office of President before us when we are in the presence of the Constitution and statutes of the United States.

The President as Director of the Administration

The President is the head of the national administration. It is his duty to see that the Constitution, laws, and treaties of the United States, and judicial decisions rendered by the federal courts are duly enforced everywhere throughout the United States. In the fulfilment of this duty, he may direct the heads of departments and their subordinates in the discharge of the functions vested in them by the acts of Congress. The exact degree, however, to which he may control an administrative officer is frequently a subject of political controversy, and cannot be set down with precision; it depends more upon the personality of the President than upon any theories of constitutional law.[1]

[1] The President's power of direction is a product of historical development. It does not necessarily inhere in the Constitution. This power, according to Professor Goodnow, is "hardly recognized in the Constitution. The only

Some of the departments, however, are made more directly subject to the President's control than others. For example, the Secretary of State, in the conduct of foreign affairs,[1] is completely subject to the President's orders; and the Attorney-General must give an opinion or institute proceedings when required. On the other hand, when the Treasury was organized in 1789, it was definitely understood that Congress had a special control over the administration of that Department.[2]

The Supreme Court has held that the President is bound to see that an administrative officer faithfully discharges the duties assigned by law, but is not authorized to direct the officer as to the ways in which they shall be discharged.[3] Nevertheless, the President has the power to remove the head of a department who refuses to obey his orders, and it is, therefore, rather difficult to see why, in actual practice, he cannot determine, within the lines of the statutes, the general policy to be followed by that officer. When President Jackson wanted the government funds withdrawn from the United States Bank, he removed two Secretaries of the Treasury, and finally appointed a third who was known to be subservient to his will. He had his way in the end.

The President also possesses a large ordinance power — that is, authority to supplement statutes by rules and regulations

provisions from which it may be derived are those which impose upon him the duty to see that the laws be faithfully executed, and permit him to 'require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices,' but perusal of the early acts of Congress organizing the administrative system of the United States will show that the first Congress did not have the idea that the President had any power of direction over matters not political in character. . . . The act organizing the Treasury Department contains no reference to any presidential power of direction. It simply says that the Secretary of the Treasury shall generally perform all such services relative to the finances as he shall be directed to perform, and the context shows that reference is made to the direction of Congress, not to that of the President. . . . The result of our national administrative development has been thus a great enlargement of the American conception of the executive power." *Principles of the Administrative Law of the United States*, pp. 77 ff. For another view of the President's administrative power, see *Readings*, p. 177.

[1] *Readings*, p. 200.

[2] See below, p. 210.

[3] This was an early case; Kendall *v.* United States, 12 Peters, 524 (1838) It is doubtful whether this view would be taken to-day.

covering matters of detail sometimes of very great importance. Among other things, he makes rules for the army and navy, the patent office, the customs, internal revenue, consular and civil services. Sometimes he issues these rules in accordance with provisions of the statutes and sometimes under his general executive power. Many of the army regulations he promulgates as commander-in-chief. When he makes rules for the civil service, he acts under specific provisions of the civil service law. Thus under his power to remove, to see to the faithful execution of the laws, and to issue ordinances, the President enjoys an administrative authority of no mean dimensions.[1]

As chief executive the President may instruct the Attorney-General to institute proceedings against any one suspected of violating federal law, and in case of open resistance he may employ the armed force of the United States. Laxness or severity in law enforcement is, therefore, largely within his discretion.

The Power of Appointment and Removal

In connection with his administrative functions, the President may nominate a large number of federal officers. This is important from the point of view of politics, as well as administration.

When considered in relation to the manner of their selection, the civil authorities of the United States — other than the President, Vice-President, presidential electors, Senators and Representatives — fall into two groups: (1) those officers whose appointment is vested by the Constitution or by act of Congress in the President and Senate; and (2) those "inferior" officers, established by law, whose appointment is vested by Congress in the President, the courts of law, or the heads of departments.[2]

The first group embraces most of the important subordinate officers of the federal government, — the heads of departments, most of the bureau chiefs, judges of the inferior federal courts, many commissioners, such as the civil service and interstate commerce commissioners, revenue officers, and postmasters in

[1] Fairlie, *National Administration*, pp. 16 ff.

[2] Each house of Congress, of course, controls the appointment of its own officers — except the presiding officer of the Senate.

large cities and towns. Taken together, they constitute an official army, whose salaries aggregate many million dollars a year. In filling these positions, the President and Senate are not hampered by any rules regarding qualifications; and as most of these officers hold for a term of four years, either under the Tenure of Office Act of 1820[1] or by other acts or practice, their appointment gives to each incumbent of the presidential office the disposal of an enormous amount of patronage.

The right of Congress to determine what is an "inferior" office has never been questioned, but no very consistent rule has been adopted in this matter. A few bureau chiefs of great importance — principally in the Department of Agriculture — are "inferior" officers in the view of the law because their appointment is vested in the President or in the head of the department. On the other hand many bureau chiefs are appointed by the President and Senate. The Librarian of Congress is appointed by the President alone; and the great army of clerks and minor officers are chosen by heads of departments.

The offices to be filled by the President and Senate may be divided into groups according to the degree of freedom which the President enjoys in making his own selections.[2]

1. Members of the Cabinet, that is, heads of departments, are usually the President's personal selection, although in this matter he is often controlled by preëlection promises or by obligations incurred in engaging the active support of certain prominent men in his party. At all events, the Senate, even when it is in the hands of an opposition party, does not seek to control the appointments to these offices; it usually ratifies the President's nominations promptly and without objections. The choice of

[1] Congress, by this act passed in 1820, fixed the term of a large number of federal officers at four years subject to the President's removal power. The officer holding one of these positions is not guaranteed a four-year term, but may be removed by the President at will. Finley and Sanderson, *The American Executive*, p. 258. Federal judges, of course, hold office during good behavior.

[2] It should be noted that, under the Constitution, the President may fill vacancies occurring during a recess of the Senate by granting commissions which expire at the end of the next session of that body. See Ford, *Rise and Growth of American Politics*, p. 290.

diplomatic representatives is also left largely to the President's discretion, as far as the Senate is concerned; although he often has many party obligations to consider in this connection. Military and naval appointments, especially in times of crisis, are principally subject to presidential control, but political influences are by no means wanting here. It is not often that the Senate rejects nominations to the Supreme Court.

2. A second group of offices, filled by the President and Senate, is largely subject to the control of the Senators, as a result of the practice known as "senatorial courtesy."[1] Under its power to advise and consent, the Senate does not officially attempt to suggest nominations to the President, but by a custom which has grown up, it will only ratify appointments that are approved by the Senators (of the President's party) from the state in which the offices in question are located. If, however, they are located in a state not represented by a Senator of the same party, the President is freer to act.[2] Thus it happens that appointments to federal offices within a state represented by members of the President's party are generally made by the Senators, or by the senior Senator, if he is the stronger of the two. This is not always the case, however. For example, President Garfield refused to place before the Senate certain candidates for federal offices in New York suggested by Senators Platt and Conkling of that state. The Senators, feeling that their rights had been infringed by this executive action, thereupon tendered their resignations, but on asking for vindication by the New York legislature failed to be reëlected. Here again, it is not a matter of formal rule, but of time and circumstance — of the character of the President, Senators, and appointees in question.[3]

3. A third group of offices filled on presidential nomination is composed of minor positions within congressional districts, such as collectors of internal revenue and their assistants. It has become a settled custom to allow the Representative, if he is of the President's party, to name the appointees of his district; but if

[1] *Readings*, p. 212. These officers include revenue collectors, postmasters in large cities, customs officers, judges of inferior courts, district attorneys, etc.

[2] If there is no Senator or Representative from a state, belonging to his party, the President consults party leaders in the state in question.

[3] On this see Reinsch, *American Legislatures*, pp. 87 ff.

he is not of the President's party the patronage goes to the Senator or Senators, as in the case of offices within the second group. Mr. Bristow, while the Fourth Assistant Postmaster-General, testified that when there was a vacancy in a post-office, the administration in power would send a request, upon a printed blank, to the member representing the district, if he was in political sympathy with the President's party, asking for the recommendation of some one to fill the place.[1] The advice of the member is not binding, however, if the character or fitness of his nominee is not satisfactory to the government. This patronage is of considerable political importance, and in most states it is used in connection with the local party organization.[2] Thus local

[1] *H. R. Reports*, 58th Cong., 2d Sess., No. 2372, p. 7. Speaking of this necessity of the President's reliance on the recommendations of members of Congress, President Taft said: "A member of a community remote from the capital . . . wonders that a President, with high ideals and professions of a desire to keep the government pure and have efficient public servants, can appoint to an important local office a man of mediocre talent and of no particular prominence or standing or character in the community. Of course the President cannot make himself aware of just what standing the official appointed has. He cannot visit the district; he cannot determine by personal examination the fitness of the appointee. He must depend upon the recommendations of others; and in matters of recommendations, as indeed of obtaining office, it is leg muscle and lack of modesty which win, rather than fitness and character. The President has assistance in making his selection, furnished by the Congressmen and Senators from the locality in which the office is to be filled; and he is naturally quite dependent on such advice and recommendation. He is made more dependent on this because the Senate, by the Constitution, shares with him the appointing power; . . . practically because of the knowledge of the Senators of the locality, the appointing power is in effect in their hands subject only to a veto by the President." *Four Aspects of Civic Duty*, p. 98.

[2] The way in which this system may work out is finely illustrated by this despatch from Washington, printed in the New York Evening Post, of December 18, 1909: "Senator Albert J. Beveridge of Indiana is one of the busiest men in Congress this winter. In the last Congressional election all but two of the thirteen Congressional districts in Indiana went Democratic, and a Democrat was elected Senator, so that Mr. Beveridge has control of the patronage of eleven Congressional districts, as well as of the general patronage of the entire State. All told, the Senator expects to dispose of about 200 jobs this winter, ranging in importance from postmaster to two collectors of internal revenue.

"Realizing his responsibility, the Senator held conferences in many parts of the state before coming to Washington, with a view of ascertaining the wishes of the people most affected. It has been generally supposed that the Senator

influences make their way upward into the federal administration and give a certain amount of autonomy in a highly centralized system. This task of selecting appointees is usually a very vexatious one for the member, for he finds it difficult to please all of his constituents, and sometimes makes more enemies than friends by his appointments.

The power of removal, so indispensable for the conduct of an efficient administration, has been one of the controverted points of our constitutional law, but it seems now to have been settled with a fair degree of definiteness. The Constitution makes no provision for removal except by way of impeachment, but this is too cumbersome a process to be used often, especially for minor places. It was, therefore, early agreed that the right of removal was constitutionally inherent in the right to appoint,[1] and that the President, without consulting the Senate, could remove the officers whom he nominated. This principle was accepted until 1867, when Congress, then engaged in a bitter controversy with President Johnson, passed the Tenure of Office Act providing that the President must secure the consent of the Senate in making removals. This law, however, was later modified, and in 1887 repealed altogether, so that the former principle seems to be restored, namely, that the President can remove all officers whom he appoints or nominates in the executive branch of the government. The President can even remove before the expiration of the term for which an officer is appointed, and is not required to assign any causes at all for his action.[2]

would build up a political machine of his own in making these appointments, but the fact is he is retaining many of the old appointees of the Fairbanks organization in office. His friends are beginning to wonder whether Beveridge is playing into the hands of his enemies in his own party, or has won over the old machine to himself."

[1] So at least many publicists put it, but in strict accord with this principle the Senate should share in removal inasmuch as it shares in the right to appoint. The principle is vague but the practice is certain: the President may remove his appointees.

[2] *Readings*, p. 197. The federal judges, of course, hold office during good behavior and can be removed only by impeachment.

The War Powers of the President

The President is commander-in-chief of the army and navy and of the state militia when called into the service of the United States. He holds this power in time of peace as well as in time of war. The equipment of the army and navy and the right to declare war, however, belong to Congress, and it is not possible to say just how far into the actual direction of the forces Congress may go under its constitutional authority. Some publicists have even contended that Congress can provide that a particular officer shall be assigned by the commander-in-chief to a particular division, or that in case a regiment or company has been despatched to a certain point by presidential order, Congress can countermand the order.[1] If this is true, it is difficult to see why Congress might not in a slow and cumbersome way practically direct the conduct of a campaign. However, it is contended, on the other side, with more reason, that the power of Congress ends with providing and maintaining the army and navy and declaring war; and that the entire command of the military and naval forces is vested in the President, whose guidance, under the Constitution, is the law of nations and the rules of civilized warfare.[2]

The President appoints all military and naval officers by and with the advice and consent of the Senate, — except militia officers who are appointed by the respective states, — and in time of war he may remove them at will. In time of peace, however, they are removed by court martial.

The President is not limited in the conduct of war to the direction of the armed forces; he may do whatever a commander-in-chief is warranted in doing under the laws of war to weaken and overcome the enemy. It was under this general authority, inherent in his office, that President Lincoln, during the Civil War, suspended the writ of habeas corpus in states that were not within the theatre of the armed conflict.[3] It was under this authority that he emancipated

[1] Reinsch, *Readings*, p. 22.

[2] See below, chap. xvii; and *Readings*, pp. 184 and 308 ff.

[3] The courts have held that Congress has the power to suspend the writ of habeas corpus, but Congress has conferred it on the President.

the slaves in the sections at war with the Union; arrested those charged with giving aid and comfort to the Confederacy; established a blockade of southern ports; and, in short, brought the whole weight of the North, material and moral, to bear in the contest. Greater military power than was exercised by President Lincoln in the conduct of that war it would be difficult to imagine.[1] During the war against the Central Empires (1917–18) the President's ordinary powers as commander-in-chief were immensely increased by acts of Congress conferring upon him almost unlimited authority over the economic and man power of the nation (see below Chapter XVII). The Overman Act of May 20, 1918, gave him the right to coördinate and consolidate the agencies of national administration. Without express warrant from Congress he sent American troops to Russia.

Under his war power, the President may govern conquered territory, appoint officers there, make laws and ordinances, lay and collect taxes of all kinds, and, in short, exercise practically every sovereign right, until Congress has acted. One limitation has been laid on this power by the Court; it was held that, after the ratification of the treaty with Spain, duties could not be laid by executive order on goods passing from the Philippines and Porto Rico to the United States or vice versa.

The President may use armed forces in carrying into execution the federal law against resistance that cannot be overcome by ordinary civil process. The United States, under the Constitution, guarantees to each commonwealth a republican form of government, and protects it against invasion, and, on application of the legislature or of the executive (if the legislature is not convened), against domestic violence. By act of Congress, the President is authorized to call forth the militia when aid is asked in due form by the authorities of a state struggling against an insurrection. It is by statutory law also that the President is empowered to use the militia or the army and navy whenever, by reason of obstructions, assemblages, or rebellion, it becomes impracticable, in his judgment, to enforce federal law within any state or territory by the ordinary course of judicial procedure. It was under this authority, and his general obligation to see to the faithful execution of the law, that President Cleveland used federal troops during the Chicago strike in 1894.[2]

[1] *Readings*, p. 69; see below, chap. xvii. [2] *Readings*, p. 317.

The President and Foreign Affairs

The President is the official spokesman of the nation in the conduct of all foreign affairs,[1] and he is primarily responsible for our foreign policy and its results. It is true, however, that he is controlled in some matters by the Senate and in others by Congress. The Senate must confirm his nominations to diplomatic and consular positions, and must approve his treaties, and Congress alone can create diplomatic and consular positions and provide the salaries attached to them. Congress must also, in many cases, make provision for the execution of treaties, but it has no right to establish and conduct relations with any foreign power independently of the President.

Under the Constitution, the President appoints ambassadors, other public ministers, and consuls, subject to the confirmation of the Senate; he makes treaties with the consent of two-thirds of the Senators present; and he receives ambassadors and public ministers from foreign countries;[2] but his authority is not limited to the formal letter of the law. He may do many things that vitally affect the foreign relations of the country. He may dismiss an ambassador or public minister of a foreign power for political as well as personal reasons, and, if on the former ground, he might embroil the country in war. His power to receive any foreign representative authorizes him to recognize the independence of a new state, perhaps in rebellion against its former legitimate sovereign,[3] and thus he might incur the risk of war. He may order a fleet or a ship to a foreign port under circumstances that may provoke serious difficulty; the ill-fated battleship Maine was sent to the harbor of Havana by President McKinley at a time when it was regarded by many Spaniards, though not officially, as an unfriendly act. The result all the world knows. As commander-in-chief of the army he might move troops to such a position on the borders of a neighboring state as to bring about an armed conflict. A notable instance of such an action occurred in the case of the opening of the

[1] *Readings*, p. 183.

[2] See below, chap. xvi.

[3] For example, Mr. Roosevelt's recognition of the Republic of Panama in revolt against Colombia.

Mexican War, when President Polk ordered our troops into the disputed territory, and, on their being attacked by the Mexicans, declared that war existed by act of Mexico. Again, in his message to Congress the President may outline a foreign policy so hostile to another nation as to precipitate diplomatic difficulties, if not more serious results. This occurred in the case of the Venezuelan controversy, when President Cleveland recommended to Congress demands which Great Britain could hardly regard as anything but unfriendly. President Wilson, in his negotiations with Germany after the sinking of the *Lusitania* in 1915, followed a policy destined to make war on the German Imperial Government, the one recourse open to the Congress of the United States. It was his definition of American rights that made war the only alternative to a surrender of national prestige.

The President may even go so far as to make "executive agreements" with foreign powers without the consent of the Senate. The Constitution requires that only "treaties" shall be confirmed by the Senate, and long practice has shown conclusively that this term does not cover every sort of an international arrangement which may be made.[1] Every adjustment of a minor matter with a foreign country is an agreement.

The line between a treaty and an executive agreement is difficult to draw; but the character of the power which the President can wield under his right of making such agreements is well illustrated by Mr. Roosevelt's action with regard to Santo Domingo. In January, 1905, he drafted a treaty with the government of the republic to the effect that the United States would maintain the integrity of that country, supervise the administration of its finances, make provisions for the settlement of foreign claims, and generally assist in keeping order there. The Senate, however, refused to ratify this treaty; and the President thereupon secured from the Dominican government the appointment of American citizens to supervise the finances; made provision for the deposit of a certain portion of the republic's revenues for the benefit of foreign creditors; and sent American battleships to the ports of that country. In short, he carried out the main terms of the agreement without senatorial approval, and his policy was

[1] J. B. Moore, "Treaties and Executive Agreements," Political Science Quarterly, Vol. XX, pp. 385 ff.; also *International Law Digest*, Vol. V, p. 210.

severely criticised by the opposition in the Senate. "The treaty has been practically carried into effect without consulting the Senate," contended Senator Rayner. "The appointment of an American agent as an official of Santo Domingo to collect its customs was simply a cover and an evasion. Under the principles of international law and the comity of nations, this government is morally bound for the proper custody of this fund, and would be liable in case of its waste or loss. . . . Now when you add to this the fact that our warships are in the harbors of the island ostensibly for the purpose of protecting American interests, but in reality protecting the officials of the island against any menace from without and revolution from within, you have the establishment of a sovereignty or a protectorate without a word from Congress or the Senate sanctioning the same."[1] It is evident that the President, under his unquestioned authority to make executive agreements, might go to great lengths and make arrangements with a foreign power far more serious in character than is often stipulated by formal treaty. Nevertheless, in this matter as in many other matters of government, time and circumstance must determine.

The President, in addition to his administrative duties, enjoys the power to grant reprieves and pardons (except in cases of impeachment) for offences against the United States. No limits are imposed on his exercise of this power, and therefore it may be used as he sees fit. He may remit a fine, commute a death sentence to a term of imprisonment, or free the offender altogether; but when forfeiture of office is one of the penalties imposed, he cannot restore the offender to his former position. Though the usual process is to pardon after conviction, a pardon may be granted before or during trial.

In the exercise of his power of pardon, the President relies, of course, largely upon the opinions of others. The application for executive clemency with all the papers attached is sent to the Attorney-General, in whose department there is a pardon-clerk in charge of the preliminary stages. Usually the judge and district attorney under whose supervision the case was first tried are asked to make any statement they may choose about the merits of the case. The Attorney-General endorses on the appli-

[1] Reinsch, *Readings*, pp. 79 ff., for a full discussion of this important point.

cation his opinion as to what course of action should be pursued, and the papers are then sent to the President for final determination. "If the trial seems to have been fairly conducted," said President Harrison, "and no new exculpatory evidence is produced, and the sentence does not seem to have been unduly severe, the President refuses to interfere. He cannot weigh the evidence as well as the judge and jury. They saw and heard the witnesses, and he has only a writing before him. It often happens that the wife or mother of the condemned man comes in person to plead for mercy, and there is no more trying ordeal than to hear her tearful and sobbing utterances and to feel that public duty requires that she be denied her prayer." [1]

The President and Legislation[2]

The President's position as chief executive officer is so exalted and the powers of that place are so extensive, that his functions as a legislator, both constitutional and customary, are often lost sight of by commentators. He is required by the Constitution to give to Congress from time to time information of the state of the Union and to recommend such measures as he may judge necessary and expedient. In the exercise of this function, he may recommend laws and even draw bills, which Congress willingly accepts, or which it accepts reluctantly under the feeling that the President has the support of his party throughout the country, or which it modifies or rejects altogether if it disapproves.

The message is the one great public document of the United States which is widely read and discussed. Congressional debates receive scant notice, but the President's message is printed almost *in extenso* in nearly every metropolitan daily, and is the subject of general editorial comment throughout the length and breadth of the land. It is supposed, though often erroneously, to embody in a very direct sense the policy of the presidential party; it stirs the country; it often affects congressional elections; and if its recommendations correspond with real and positive interests of sufficient strength, they sooner or later find their way into law.

[1] Harrison, *This Country of Ours*, pp. 146 ff.
[2] *Readings*, pp. 194 and 265.

There ought to be no cavil about the President's frequent and considerable use of the power to give information to Congress. "From the nature and duties of the executive department," says Story, "he must possess more extensive sources of information as well in regard to domestic as to foreign affairs than can belong to Congress. The true workings of the laws, the defects in the nature or arrangements of the general systems of trade, finance, and justice; and the military, naval, and civil establishments of the Union are more readily seen, and more constantly under the review of the executive, than they can possibly be of any other department. There is great wisdom, therefore, in not merely allowing, but in requiring the President to lay before Congress all facts and information which may assist their deliberations; and in enabling him at once to point out the evil and suggest the remedy. He is thus justly made responsible, not merely for a due administration of the existing systems, but for due diligence and examination into the means of improving them."[1]

Of course, it may be questioned whether, in these days of swift communication of thought and argus-eyed journalists, there is very much in the President's message, that is new to Congress; and moreover, a great deal of the work of fitting legislation to conditions is done either by special or regular committees supposed to be more or less expert in the branches of legislation intrusted to their charge. Nevertheless, there can be no doubt about the advisability of a close association between those who make and those who enforce the laws. Especially is this true since the President is the only officer of the national government who represents the national party as a whole, and it is to him that the country looks for results in administration — results which can only be brought about by his cöoperation with his party in Congress.

The presidential message, at the opening of Congress, was delivered in person to the Senate and House in joint assembly by Washington and Adams; but this was abandoned by Jefferson.[2] From that time forward it was the practice to communicate by means of written messages until President Wilson in 1913 revived the old custom of delivery in person.

[1] *Commentaries* (5th ed.), Vol. II, p. 382.
[2] *Readings*, p. 192.

The Presidential message is very often not the work of the President alone, and there are notable instances of its being principally the work of some one else. In every case, especially of the message prepared for the opening session of Congress, the information contained in the document is largely furnished by the various departments. The President treats the material sent to him by the respective officers as he sees fit, sometimes taking out paragraphs, sometimes condensing, sometimes using it merely as the basis for his own conclusions. Some of President Roosevelt's special messages were founded on the reports of commissions, and were accompanied by handsome illustrations; others were his own work, prepared primarily to promulgate his own views on some topic which he wished to make of public interest. President Wilson employed the message to communicate his policies not only to the country but to the whole world, including the European nations in arms against the United States.

The treatment which the President's recommendations receive, of course, varies according to circumstances. They may be accepted, because Congress feels that they are sound in principle or because there is an effective demand for them in the country; or they may be accepted because the President by his party leadership, or personal favors, or use of patronage can bring the requisite pressure to bear on Congress to secure their passage.

The power of vetoing measures of Congress, like that of sending messages, possesses a legal and a practical aspect. Every bill or joint resolution must be presented to the President; if he signs, it becomes a law; if he disapproves, he must return it to the house in which it originated, with a statement of his objections; and the house must, thereupon, reconsider it. A two-thirds vote of both houses is sufficient to carry the measure over the executive veto. The same procedure is applied to orders, resolutions, and votes to which a concurrence of both houses is necessary, excepting questions of adjournment. If the President fails to return a measure within ten days (Sundays excepted) after it is presented to him, it becomes a law without his signature, unless Congress prevents its return by adjourning, in which

[1] In practice "concurrent resolutions" are not submitted to the President. See below, p. 290. In practice also amendments to the federal Constitution are not submitted to the President. Burgess, *Political Science and Constitutional Law*, Vol. I, p. 148.

case it does not become a law if the President vetoes it, or fails to sign it. When Congress adjourns leaving many bills to be signed, the President may suppress quietly the bills to which he entertains objections; and this is known as the "pocket veto." [1]

The President does not veto single items in appropriation bills, and Congress has attached other measures — disapproved by the President — to appropriation laws, and thus forced his signature. This practice of attaching "riders" is somewhat discredited, and is seldom employed.

The veto power, in Hamilton's view, was conferred on the President because of the propensity of the legislative department to intrude upon the rights and absorb the powers of the other departments, and also because of the necessity of furnishing the executive with a means of defending his constitutional prerogatives. But he added, "The power in question has a further use. It not only serves as a shield to the executive, but it furnishes an additional security against the enaction of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body. . . . They will consider every institution calculated to restrain the excess of law-making, and to keep things in the same state in which they may happen to be at any given period, as much more likely to do good than harm; because it is favorable to a greater stability in the system of legislation." The veto may be used by the President as the representative of the whole country against measures enacted at the behest of group or sectional interests.[2]

On the question of exercising the veto, different views have prevailed. Jefferson contended: "Unless the President's mind, on a view of everything which is urged for and against the bill, is tolerably clear that it is unauthorized by the Constitution — if the pro and con hang so even as to balance his judgment — a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion." [3] General Taylor held [4] that the veto power should never be exercised "except in

[1] *Readings*, p. 187.
[2] *The Federalist*, No. LXXIII.
[3] Quoted in Lincoln, *Works*, Vol. II, p. 61.
[4] *Ibid.*, Vol. II, p. 61.

cases of clear violation of the Constitution, or manifest haste and want of consideration by Congress." President Jackson, however, whose relations to Congress were quite different from those of either Jefferson or Taylor, had his own opinion of what the Constitution was, and alleged unconstitutionality as one of the grounds for vetoing the Bank Bill, although such an institution had been declared constitutional by the Supreme Court.[1] In vetoing a bill, President Grant assigned as his reason the fact that it was "a departure from true principles of finance, national interest, national obligations to creditors, congressional promises, party pledges (of both political parties), and personal views and promises made by me in every annual message sent to Congress and in each inaugural address." Mr. Cleveland expressed his opinion that the veto power was given to the President for the purpose of invoking the exercise of executive judgment and inviting independent executive action.

Certainly the President is expected to safeguard the Constitution by vetoing unconstitutional acts of Congress. This is especially true because many laws can only be brought before the Courts in a collateral way, if at all.

The development of the exercise of the veto power is thus summed up by Finley and Sanderson:[2] "From the organization of the government under the Constitution to the end of President Cleveland's second term, the number of bills vetoed was about five hundred. Authorities differ slightly. The figures, including pocket vetoes upon which messages were written and bills informally or irregularly presented, seem to be four hundred and ninety-seven, of which the number regularly vetoed appears to be four hundred and eighty. Two hundred and sixty-five of these were private pension bills, of which five were vetoed by President Grant and the remainder by President Cleveland. Of private bills, other than pension bills, seventy were vetoed; of local or special bills, eighty-seven. The remainder, seventy-five in number, including bills for the admission of states into the Union, are classified as general bills. Of these seventy-five, President Washington vetoed two, Madison three, Jackson six, Tyler five, Polk one, Pierce three, Buchanan three, Lincoln two,

[1] *Readings*, p. 187.
[2] Finley and Sanderson, *The American Executive*, p. 211.

Johnson eighteen, Grant nine, Hayes ten, Arthur three, Cleveland eight, Benjamin Harrison two." John Adams, Jefferson, John Quincy Adams, W. H. Harrison, Taylor, Fillmore, and Garfield did not use the veto power. Mr. McKinley vetoed at least fourteen measures and Mr. Roosevelt at least forty-two.

The procedure of the President in dealing with bills has been described by Mr. Harrison.[1] On its passage through Congress, a bill is signed by the President of the Senate and Speaker of the House; it is then taken to the Executive Mansion and usually referred to the head of the executive department to which its subject matter relates; in case a question of constitutionality arises, the Attorney-General is consulted. The bill then goes to the President with the departmental report upon it, and if he approves he signs the bill, dates it, and sends it to the Department of State for filing and publication. If he disapproves the bill, and Congress is still in session, he returns it to the house in which it originated, with his objections, and perhaps with recommendations for amendment.

The veto power, taken in connection with the message and the appointing power, is an effective political instrument in the hands of the President. By using a threat of the veto, he may secure the passage of bills which he personally favors; and at all times, in considering important measures, Congress must keep in view the possible action of the President, especially where it is a party question and the correct attitude before the country is indispensable. Mr. Roosevelt even went so far as to warn Congress publicly that he would not sign certain measures then before that body — and raised a storm of protest from those who said that he should not veto a bill until it was laid before him.

The President's Privileges and Rights

In addition to his powers and duties, the President enjoys certain privileges and rights. No tribunal in the land has any jurisdiction over him for any offence. He cannot be arrested for any crime, no matter how serious — even murder.[2] He may be impeached, but until judgment has been pronounced against him, he cannot be in any way restrained of his liberty.

[1] *This Country of Ours*, p. 128.

[2] Burgess, *Political Science and Constitutional Law*, Vol. II, p. 246.

The President is entitled by right to payment for his services, for the Constitution provides that he shall receive at stated times a compensation which may not be increased or diminished during the term for which he is elected. He is forbidden, however, to receive any other emolument from the United States or from any state. The salary of the President was fixed at $25,000 in the beginning; it was increased to $50,000 in 1871; and to $75,000 in 1909. In addition to his personal salary the President is furnished an Executive Mansion, executive offices, and certain other allowances.

The Relations of the Executive and Legislative Departments

There is a tradition in American political theory to the effect that the executive and legislative departments ought to be kept entirely separate. An examination of Numbers 47 and 48 of the *Federalist* shows however that the framers of the Constitution were aware of very decided limitations on the theory. Madison, the author of these numbers, called attention to the fact that among the first state constitutions "there is not a single instance in which the several departments of power have been kept absolutely separate and distinct." He went on to say that "unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." The leadership which Washington and Hamilton took in drafting and supporting important measures of law passed by the early Congresses under the Constitution proved that they did not think the executive a mere agent to carry into effect the decisions of Congress after they had been independently reached.

As a matter of practice from that time to this, it has been found impossible, even highly undesirable, to keep the departments separate. Such separation breaks the natural tie that should exist between the body that expresses popular will and the authority charged with carrying that will into execution. It would strip the President of the rightful power which he enjoys as a leader in formulating public policies. Accordingly there has been established a fairly close connection between the executive and legislative departments. This has been accomplished in many ways.

1. In the first place, the party tie, of necessity, binds the President and the members of his party in Congress. Although they may from time to time engage in controversies more spectacular than edifying, yet on fundamental matters of policy, the President and Congress must come into a sort of working agreement. Furthermore, the President is regarded as the leader of his party, and it is to him, rather than to Congress, that his party looks for the enforcement of any specific promises laid down in the platform or made officially during the presidential campaign. Congress cannot, therefore, ignore the leadership of the President, and, however much it may oppose his policy, it must give heed to those measures in which he has unquestioned national party support.

Within recent years, we have come to recognize more frankly than ever this position of the President as party leader. Mr. Roosevelt was largely responsible for the policies which the Republican party has made national issues. In his speeches made at different points throughout the country, and in his presidential messages, he advocated doctrines and measures which Congress was compelled, even against its will, to accept because it realized that he had behind him powerful national interests which could not be disregarded.[1] As party leader he issued, in 1906, a general letter endorsing the Republican members of Congress and calling upon the country to support them in the coming election; two years later he singled out individual members of Congress and gave them special letters of commendation.[2]

Mr. Taft likewise frankly assumed the position of party leadership. He was largely instrumental in the adjustment of differences between the Senate and the House of Representatives over the tariff bill of 1909. While it may not be said that his conclusions on every matter were accepted, there can be no doubt that his frequent meetings with the members of the joint conference committee charged with the settlement of those differences were of the greatest significance in securing harmony and "a reasonable compliance with the party pledges for tariff revision" that were laid down in the platform on which he made his presidential campaign.

[1] *Readings*, p. 265.
[2] New York Times, May 28, 1908.

Mr. Taft expressly declared that he believed it to be the duty of the President to assume the position of leadership in his party. "Under our system of politics," he says, "the President is the head of the party which elected him, and cannot escape responsibility either for his own executive work or for the legislative policy of his party in both houses. He is, under the Constitution, himself a part of the legislature in so far as he is called upon to approve or disapprove acts of Congress. A President who took no interest in legislation, who sought to exercise no influence to formulate measures, who altogether ignored his responsibility as the head of the party for carrying out ante-election promises in the matter of new laws, would not be doing what is expected of him by the people. In the discharge of all his duties, executive or otherwise, he is bound to a certain extent to consult the wishes and even the prejudices of the members of his party in both houses, in order that there shall be secured a unity of action by which necessary progress may be made and needed measures adopted." [1]

The climax of executive leadership during recent years was reached during the six years of Mr. Wilson's administration (1913–19) in which his party had a majority in both houses of Congress. He exerted a powerful influence in the drafting and passage of every great measure of law. He went personally to the Capitol to consult with Senators and Representatives. He was in fact, if not in theory, the national law-maker.

2. The party tie is by no means the only bond of union between the executive and legislative departments. By vesting the appointing power to a large number of important offices in the hands of the President and Senate, the Constitution draws the two departments together. The extent to which the President may use his power over appointments to influence his party friends in Congress, or the extent to which the Senate may employ its confirming power to bend the President to its will, depends upon circumstances; but it is perfectly clear that either may take advantage of the opportunity offered by this constitutional connection. An excellent illustration of the way in which the President may influence legislation is afforded by Mr. Dana's account of President Lincoln's manœuvres to secure the adop-

[1] *Four Aspects of Civic Duty*, p. 100.

tion of the Thirteenth Amendment. It is so eloquent that it deserves quotation in full.

Lincoln was a supreme politician. He understood politics because he understood human nature. I had an illustration of this in the spring of 1864. The administration had decided that the Constitution of the United States should be amended so that slavery should be prohibited. This was not only a change in our national policy, but it was also a most important military measure. It was intended not merely as a means of abolishing slavery forever, but as a means of affecting the judgment and the feelings and the anticipations of those in rebellion. It was believed that such an amendment to the Constitution would be equivalent to new armies in the field, that it would be worth at least a million men, that it would be an intellectual army that would tend to paralyze the enemy and break the continuity of his ideas.

In order thus to amend the Constitution, it was necessary first to have the proposed amendment approved by three-fourths of the states. When that question came to be considered, the issue was seen to be so close that one state more was necessary. The state of Nevada was organized and admitted into the Union to answer that purpose. I have sometimes heard people complain of Nevada as superfluous and petty, not big enough to be a state; but when I hear that complaint, I always hear Abraham Lincoln saying, "It is easier to admit Nevada than to raise another million of soldiers."

In March, 1864, the question of allowing Nevada to form a state government finally came up in the House of Representatives. There was strong opposition to it. For a long time beforehand the question had been canvassed anxiously. At last, late one afternoon, the President came into my office, in the third story of the War Department. . . .

"Dana," he said, "I am very anxious about this vote. It has got to be taken next week. The time is very short. It is going to be a great deal closer than I wish it was."

"There are plenty of Democrats who will vote for it," I replied. "There is James E. English, of Connecticut; I think he is sure, isn't he?"

"Oh, yes; he is sure on the merits of the question."

"Then," said I, "there's 'Sunset' Cox, of Ohio. How is he?"

"He is sure and fearless. But there are some others that I am not clear about. There are three that you can deal with better than anybody else, perhaps, as you know them all. I wish you would send for them."

He told me who they were; it is not necessary to repeat the names here. One man was from New Jersey and two from New York.

"What will they be likely to want?" I asked.

"I don't know," said the President; "I don't know. It makes no difference, though, what they want. Here is the alternative: that we carry this vote, or be compelled to raise another million, and I don't know how many more, men, and fight no one knows how long. It is a question of three votes or new armies."

"Well, sir," said I, "what shall I say to these gentlemen?"

"I don't know," said he; "but whatever promise you make to them I will perform."

I sent for the men and saw them one by one. I found that they were afraid of their party. They said that some fellows in the party would be down on them. Two of them wanted internal revenue collector's appointments. "You shall have it," I said. Another one wanted a very important appointment about the custom house of New York. I knew the man well whom he wanted to have appointed. He was a Republican, though the congressman was a Democrat. I had served with him in the Republican county committee of New York. The office was worth perhaps $20,000 a year. When the congressman stated the case, I asked him, "Do you want that?"

"Yes," said he.

"Well," I answered, "you shall have it."

"I understand, of course," said he, "that you are not saying this on your own authority?"

"Oh, no," said I; "I am saying it on the authority of the President."

Well, these men voted that Nevada be allowed to frame a state government, and thus they helped secure the vote which was required. The next October the President signed the proclamation admitting the state. In the February following, Nevada was one of the states which ratified the Thirteenth Amendment by which slavery was abolished by constitutional prohibition in all of the United States.[1]

3. The imperative necessity under which Congress is placed of securing information from executive departments with regard to legislative matters, and the desire of executive officers to secure new laws and amendments to old laws, constitute another important bond of union between the executive and the legislature. Congress is constantly making demands upon the executive for papers, documents, and special information of one kind or another, and in so far as the President regards these demands as reasonable and compatible with public interest he complies with them. As a matter of right, Congress may call upon the

[1] C. A. Dana, *Recollections of the Civil War*, pp. 174–177.

executive for information, but it has no power, under the Constitution, to compel him to furnish papers and documents.

In practice, the anxiety of the administration to secure favorable consideration of its own measures in Congress leads it to comply quite readily with requests for information. This is as it should be, for frequently those who have charge of the execution of the laws know more about the actual conditions to which the laws must apply and the actual effect of the laws than do the legislators themselves.[1] Furthermore, it is wise that those who are called upon to execute the laws should know the spirit and intention of those who have passed them.

4. Quite an intimate relation is established between Congress and the executive through the practice of the former in inviting the assistance of departmental chiefs in drafting bills. Very frequently the Attorney-General, who is supposed to be merely the legal adviser of the President, is asked to give his opinion before a committee or to advise members of Congress on some particular matters up for legislative action.[2] It is also sometimes the practice for heads of departments to draft complete measures, transmit them to Congress either through a friend in that body, or even directly, and secure their reference to proper committees and ultimately their passage.[3] It is a matter of common knowledge also that the President from time to time invites to the White House members of Congress who may be of influence in securing the enactment of laws favored by the administration. On the other hand, Congress has in a number of instances even assumed the right to advise the President, by a statute or by a resolution, to adopt some particular executive policy.

5. Another important line of connection is established between the executive and legislature through appropriations. The Treasury Department is by law placed in a special relation to Congress; for Congress has the power to call directly upon that department for financial information without going through the form of making a request to the President. The Treasury Department collects the estimates of the amount of money

[1] It should be remembered that many members of Congress have seen long committee service and know more about administration than a new President or executive officer.

[2] This is informally, of course.

[3] *Readings*, pp. 196 and 267.

required by the various executive branches and compiles these estimates in a book which is printed and submitted to Congress at the beginning of each regular session. The first Secretary of the Treasury, Hamilton, claimed the right to report whenever he pleased on financial matters, although in practice his famous reports and recommendations were submitted to Congress only upon request. It is true, his demand for admission to the House of Representatives for the purpose of defending his policies was denied; but throughout his term he maintained very close relations with his supporters in Congress and directed legislative tactics especially with regard to the funding of the national debt and the assumption of state debts. In a letter to Jay he wrote: "'Tis not the load of proper official business that alone engrosses me, though this would be enough to occupy any man. 'Tis in the extra attention that I am obliged to pay to the course of legislative manœuvres that alone adds to my burden and perplexity."[1]

This relation between the executive department and Congress in the matter of finance has been made even more intimate by the law of 1909, authorizing the President to review the estimated expenditures and revenues and make specific recommendations to Congress as to the best methods to be employed in securing a satisfactory balance in the budget. This law shifts to the President a large burden of responsibility which has hitherto rested on Congress and undoubtedly will give an additional weight to executive influence in legislative matters.

Proposals to Establish Formal Connections between the Executive and Legislative Departments

Several times in our history it has been suggested that the heads of departments should be given places in the legislature for the purpose of explaining and defending there, not only measures recommended by the administration, but also the various policies pursued in the execution of the law. It is true, the Constitution would prevent heads of departments, as civil officers, from being at the same time members of either house, but the houses, either separately or jointly, may admit persons who are not members and authorize them to speak on any matter.

[1] Hamilton, *Works*, Vol. X, p. 29.

Indeed, the act of 1789 organizing the Treasury Department, provided "that the Secretary of the Treasury shall, from time to time, digest and prepare plans for the improvement and management of the revenue and for the support of public credit . . . shall make reports and give information to either branch of the legislature, *in person* or in writing as may be required, respecting all matters referred to him by the Senate or House of Representatives or which shall appertain to his office."

There are a number of examples in our early history of executive officers appearing in the Senate for the purpose of making explanations and reading messages and papers. President Washington always read his opening messages before the two houses; and appeared before the Senate to consult with that body about the terms of treaties in process of negotiation. On July 22, 1789, Mr. Jefferson, then Secretary of Foreign Affairs, visited the Senate, in accordance with instructions, and explained the nature of certain executive business before that body. Examples of this kind might be easily multiplied, but it is a matter of established history that in the days of the men who framed the federal Constitution it was a common practice to maintain close public personal relations between Congress and the Cabinet officers.

In 1881, a Senate committee, appointed for the purpose of investigating the question of the relation of the executive to the legislature, reported in favor of giving heads of departments the right to appear in Congress.[1] This committee urged that such a practice was no violation of the principle of separation of powers; that complete isolation of the two departments would produce either conflict or paralysis. Though the two departments of government have a separate existence, runs the report, "they were intended to coöperate with each other as the different members of the human body must coöperate with each other in order to form the figure and perform the duties of a perfect man." The introduction of heads of departments upon the floor of Congress, the committee urged, would make the information given to Congress more pertinent and conclusive, and would put the members of the legislature on the alert to see that executive influence was only in proportion to the value of the

[1] *Senate Report*, No. 837, 46th Cong., 3d Sess. (1881).

information, and thus would enable the public to determine whether that influence was exerted by partisanship or by argument.

In answer to those who urged that it would institute an unconstitutional relation between the executive and Congress, the committee reported: "No one who has occupied a seat on the floor of either house, no one of those who year after year so industriously and faithfully and correctly report the proceedings of the houses, no frequenter of the lobby or the gallery, can have failed to discern the influence exerted upon legislation by the visits of the heads of departments to the floors of Congress and the visits of the members of Congress to the offices in the departments. It is not necessary to say that the influence is dishonest or corrupt, but that it is illegitimate; it is exercised in secret by means that are not public — by means which an honest public opinion cannot accurately discover and over which it can therefore exercise no just control."[1] In response to the contention that the imposition of these quasi-legislative responsibilities upon heads of departments would make it impossible for them to perform their regular administrative duties, the committee recommended that under-secretaries should be appointed to whom should be confided the routine business requiring only order and accuracy, so that the chief officers could confine their attention to those larger duties involving important policies. The idea of executive participation in Congressional debates was revived again in 1913 by a special message from President Taft, but no action was taken to carry it into effect.

The case against an approach to parliamentary govern-

[1] By the following order issued November 26, 1909, President Taft proposed to cut off the subterranean connection between the subordinates in the executive departments and Congress: —

"It is hereby ordered that no bureau, office, or division chief, or subordinate in any department of the Government, and no officer of the Army and Navy or Marine Corps stationed in Washington, shall apply to either House of Congress, or to any committee of either House of Congress, or to any Member of Congress for legislation or for appropriations or for congressional action of any kind, except with the consent and knowledge of the head of the department; nor shall any such person respond to any request for information from either House of Congress or any committee of either House, or any Member of Congress, except through, or as authorized by, the head of his department."

ment has been stated by President Lowell as follows.[1] If the Cabinet officers sat in Congress, the power of the President would be reduced and the chief control of the administration would pass to the legislature. If the President were of an opposite party from that in power in Congress, his administrative authority would be reduced to almost nothing, for, in those countries where parliamentary government has been introduced, the titular executive officer, whether he be the King of England or the President of France, loses his political power. Furthermore, deadlocks between the Senate and the House over any ministerial policy would inevitably lead to the supremacy of one branch of the legislature and the decline of the other. If our development should follow the line indicated in other countries having parliamentary government, the House of Representatives would become supreme, the Senate would sink into a mere opposition of the House like the House of Lords in England, and the President would become merely a nominal head. Furthermore, such a fusion of executive and legislative departments would strengthen the federal government at the expense of the states, and would destroy the power of the courts to declare statutes invalid. In other words, it is contended, anything like parliamentary government would make a revolution in the whole framework of our federal system, and dislocate the distribution of powers among the three departments.

This argument, of course, does not apply to the proposal of the Senate committee to allow cabinet officers to discuss and defend administrative policies in either house of Congress. Doubtless such moderate change, however, would be regarded as a step in the direction of a political revolution, and we shall probably continue to maintain, by subterranean and extra-legal methods, the connections between the executive and legislature which are maintained openly and in the full light of public scrutiny in England and in France.[2]

[1] *Essays on Government*, pp. 25–45.

[2] For observations on the vice-presidency, see *Proceedings of the American Political Science Association*, Vol. IX, pp. 162–77, and the Century Magazine, Vol. LXXIX, pp. 208–14.

CHAPTER XI

THE NATIONAL ADMINISTRATION

THE innumerable duties to be fulfilled in the execution of federal law under presidential supervision are distributed among ten great departments and certain commissions established by Congress. Curiously enough, the Constitution makes no direct provision for these branches of the federal administration; but it evidently assumes their existence, for it authorizes the President to require in writing the opinion of the heads of the executive departments, and also gives Congress power to vest in them the appointment of inferior officers. It is on this constitutional basis, therefore, that Congress assumes the power to create departments by law, regulate the duties of their respective heads down to the minutest details, and prescribe their internal organization and the powers and duties of the chiefs of even the minor subdivisions. Only under the stress of the World War did Congress in 1917 pass the Overman Act authorizing the President temporarily to create, abolish, and transfer offices, bureaus, and other agencies of the government.

The Heads of Departments

The head of a federal department occupies a position radically different from that of a cabinet officer in any other country. He is appointed by the President,[1] and may be removed by him or by impeachment. His duties, however, are prescribed minutely, not in presidential orders, save in certain instances, but in statutes enacted by Congress. He is responsible to the President for the faithful execution of the law; but the President cannot alter or diminish any of the duties laid down by Congress, and cannot prevent Congress from imposing or taking away duties or from prescribing such minute details as amount to a

[1] With the Senate's approval. Above, p. 189.

practical direction of the officer. "The President," says Mr. John Sherman, "is intrusted by the Constitution and laws with important powers, and so by law are the heads of departments. The President has no more right to control or exercise the powers conferred by law upon them than they have to control him in the discharge of his duties. It is especially the custom of Congress to intrust to the Secretary of the Treasury specific powers over the currency, the public debt, and the collection of the revenue. If he violates or neglects his duty, he is subject to removal by the President or impeachment, . . . but the President cannot exercise or control the discretion reposed by law in the Secretary of the Treasury, or in any head or subordinate of a department of the government."[1] The President, as we have seen, has the power of removal, however, and may exercise it for the purpose of directing his subordinates. In actual practice, therefore, there are many variations from Mr. Sherman's apparently convincing legal argument, especially when a strong-willed President has a firm policy of his own which he is determined to carry out.[2] Indeed, the logical application of his doctrine would amount to a complete decentralization of the administrative organization and a destruction of the President's responsibility.

While it is impossible to give here a full account of the duties of each secretary, it seems desirable to consider some matters which are common to them all.

1. In the first place, a large appointing power to minor offices is conferred by law upon the departmental head, but this is now exercised under civil service rules which restrict his choice, in all except the important subordinate positions, to the candidates who have qualified by examination.[3] The power of removal generally accompanies the power of appointment, although there are some important exceptions by law and by executive order.

2. In the second place, the head of a department enjoys a certain range of freedom in issuing departmental orders, for, by act of Congress, he may "prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its

[1] J. Sherman, *Recollections*, Vol. I, p. 449; *Readings*, p. 200.
[2] See above, p. 188. [3] Below, p. 224.

business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

3. Every departmental chief maintains a more or less definite relation to Congress. He must prepare annually a report of his department,[1] but this is largely a formal compilation, for the matters of policy or detail covered in it have little or no influence in directing legislation. Though Cabinet officers cannot be members of Congress, there is, as we have seen, nothing in the Constitution excluding them from the right to sit and speak there. Custom has decreed, however, that they must bring their influence to bear in circuitous ways. They often appear before Senate or House committees to explain measures or to answer inquiries as to some legislation relating to their respective departments.[2] There are many instances of heads of departments transmitting to Congress, on their own motion, completed drafts of bills which they would like to see enacted into law.[3] They sometimes establish friendly relations with the chairmen of prominent committees, and thus obtain a hearing for their policies which would otherwise be denied to them.

4. The head of every department is subjected to constant interruptions from outside parties such as can come to the chief of no great business organization. "Washington wishes to see evidence of democracy about the departments," says a former Secretary of the Treasury, Mr. Vanderlip. "Neither Senator nor Congressman is satisfied to cool his heels in an ante-room for any length of time, nor are political leaders who come to the capitol on a mission likely to be pleased if the Secretary's engagements are such that an appointment cannot be made without notice or delay. . . . The Secretary of this great department must give heed to innumerable trifles such as would never reach the head of even a comparatively small business organization. Requests come from people of importance, and they must be taken up with the care which the position of such persons demands rather than with any thought of their importance in relation to the administration of departmental affairs."[4]

[1] The Report of the Secretary of State is transmitted to Congress with the President's annual message.

[2] Reinsch, *Readings*, p. 371. [3] *Readings*, p. 267. [4] Reinsch, *Readings*, p. 366.

5. With the multiplication of the official duties connected with immigration, commerce, transmission of mails, and taxation, it has been found necessary to give to the heads of certain departments the high authority of deciding finally upon cases appealed from lower administrative officials.[1] For example, the immigration law provides "that in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Labor"; and in such cases the decision of the Secretary is conclusive unless it can be made apparent that he has exceeded his jurisdiction or violated the law. Customs officers also are given large powers in appraising the value of imported goods, and the Court has declined to review the appraisements made by the proper authorities, declaring that the interposition of the courts in the appraisement of importations would involve the collection of the revenue in inextricable confusion and embarrassment. The Postmaster-General may issue fraud orders denying the use of the mails to persons and concerns who in his opinion are engaged in fraudulent transactions;[2] and those affected have no right to appeal to the courts for a review of the facts on which he bases his decisions.[3] In sustaining this conclusion, the Court said: "If the ordinary daily transactions of the departments which involve an interference with private rights were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of government. . . . It would practically arrest the executive arm of the government, if the heads of departments were required to obtain the sanction of the courts upon the multifarious questions arising in their departments, before action were taken in any matter which might involve the temporary disposition of private property. Each executive department has certain public functions and duties, the performance of which is absolutely necessary to the existence of the government, and it may temporarily at least operate with seeming harshness

[1] *Readings*, p. 202.

[2] See below, chap. xx; *Readings*, p. 204.

[3] They may appeal on questions involving construction of the law; School of Magnetic Healing *v.* McNulty, 187 U. S. R., 94.

upon individuals. But it is wisely indicated that the rights of the public must, in those particulars, override the rights of individuals, provided there be reserved to them an ultimate recourse to the judiciary." [1]

The Cabinet

The heads of the various departments compose the President's Cabinet; but this is a matter of custom, not of law, for the Cabinet, as a collective body, has no legal existence or powers. Congress, in creating the first departments in 1789, did not recognize, in any way, the possibility of a Cabinet council composed of the heads. Indeed, the act establishing the Treasury Department was designed, as we have seen, to bring the Secretary under congressional control in many ways. The Senate, being a small body, was then regarded as the real executive council on account of its powers of ratifying treaties and confirming appointments.

Whatever may have been the view of Congress, however, Washington regarded the four chief executive officials, including the Attorney-General, who was not made head of a department until 1870, as his confidential advisers, though the term Cabinet was not immediately applied to them. He also exercised his constitutional right of requiring opinions from the heads of departments, and took them into his confidence in all important matters very soon after the first appointments were made. We have direct evidence of Cabinet meetings as early as 1791, when Washington, having departed on a tour to the South, wrote to the three Secretaries: "I have expressed my wish, if any serious or important cases . . . should arise . . . that the Secretaries for the Departments of State, Treasury, and War may hold consultations thereon, to determine whether they are of such a nature as to demand my personal attendance." During his first administration, Washington, by a gradual process, welded the departmental heads into an executive council, and by 1793 we find the term Cabinet or Cabinet Council applied to this group of presidential advisers.[2]

The Cabinet does not meet regularly at stated times but only

[1] On this point, see *Readings*, p. 202 ff., and an article by Thomas Reed Powell on "The Conclusiveness of Administrative Determinations in the Federal Government," American Political Science Review for August, 1907.

[2] See *Yale Review*, Vol. XV, pp. 160 ff.

on the call of the President as public business requires consideration.[1] The meetings are usually secret, and no record is kept of the transactions. As the special business of each department is discussed separately with the President by each officer, only matters of weight relative to the general policy of the administration are brought up for consideration at Cabinet meetings.[2] Any important piece of legislation desired by the President or by a Cabinet officer and about to be submitted to Congress, will very probably be discussed in detail, especially if it concerns party principles. Votes are seldom taken on propositions, and they are of no significance beyond securing a mere expression of opinion. This is illustrated by an incident related of President Lincoln, who closed an important discussion in the Cabinet in which he found every member against him, with the announcement: "Seven nays, one aye, the ayes have it." Nevertheless, Cabinet meetings are of service to the administration, especially in maintaining harmonious coöperation among the departments and in formulating the executive policy. When, in 1919, President Wilson became seriously ill, it was reported that many questions were decided at cabinet meetings which he was unable to attend. Later, however, he repudiated the legality of the meetings.

The Cabinet is the President's council in a very peculiar sense, for, having no legal existence or warrant, it is not subjected as such to congressional control. In the first administration of President Jackson, the Senate requested the transmission of a paper supposed to have been read by him to the heads of the executive departments, and he replied in no uncertain language: "The executive is a coördinate and independent branch of the government equally with the Senate, and I have yet to learn under what constitutional authority that branch of the legislature has a right to require of me an account of any communication, either verbally or in writing, made to the heads of departments acting as Cabinet council. As well might I be required to detail to the Senate the free and private conversations I have held with those officers on any subject relating to their duties and my own." [3]

[1] Under President Taft one day in each week was set aside as "Cabinet day."

[2] Harrison, *This Country of Ours*, pp. 105 ff.

[3] Richardson, *Messages*, Vol. III, p. 36.

The Departments of National Administration[1]

Some indication of the complexity and extent of the administrative activities of the federal government is afforded by the following table giving the several departments and their chief officers and subdivisions.

Department of State. — The Secretary, under secretary and three assistant secretaries; chief clerk; solicitor; seven bureaus: diplomatic, consular, indexes and archives, accounts, rolls and library, appointments, and correspondence; and seven divisions: far-eastern affairs, near-eastern affairs, western European affairs, Latin-American affairs, Mexican affairs, passport control, and foreign intelligence.

Department of the Treasury. — The Secretary and six assistant secretaries; chief clerk; supervising architect; comptroller of the treasury; auditors for the Treasury, War, Interior, Navy, State (and other departments) and Post-Office Departments; treasurer of the United States, register of the treasury; comptroller of the currency; director of the mint; commissioner of internal revenue; public health service; revenue cutter service; bureau of printing and engraving; life-saving service; federal farm loan board; war risk insurance; general supply committee in charge of federal purchases.

Department of War. — Secretary of War and two assistant secretaries; chief clerk; general staff; adjutant-general; inspector-general; surgeon-general; chief of engineers; chief of ordnance; judge-advocate-general; chief signal officer; chief of the bureau of insular affairs; board of engineers for rivers and harbors; militia bureau; motor transport corps; air service; coast artillery; ordnance and fortification; chemical warfare service; tank corps.

Department of Justice. — Attorney-General; assistants; solicitor-general; solicitors for the Departments of State, Treasury, Commerce, Interior, Labor, and Post-Office, and solicitor of internal revenue; chief clerk; division of accounts; attorney in charge of pardons; appointment and disbursing clerks; superintendent of prisons; chief of division of investigations.

Post-Office Department. — Postmaster-General and four assistant postmasters-general; chief clerk; assistant attorney-general; purchasing agent; chief inspector; director of postal savings system.

Department of the Navy. — Secretary and assistant secretary; chief clerk; eight bureaus: navigation, yards and docks, ordnance, construction and repair, steam engineering, medicine and surgery,

[1] The salary of the secretaries is $12,000 each.

supplies and accounts; judge-advocate-general; general board; marine corps.

Department of the Interior. — Secretary of the Interior and two assistant secretaries; chief clerk; commissioner of patents; pensions; land office; Indian affairs; education; geological survey; and reclamation service; bureau of mines.

Department of Agriculture. — Secretary of Agriculture and assistant secretary; chief clerk; solicitor, farm management, animal industry, weather, chemistry, accounts and disbursements, entomology, soils, biological survey, plant industry; office of experiment stations; forest service; public roads; division of publications; bureau of markets; state relations service.

Department of Commerce. — Secretary of Commerce; assistant secretary; chief clerk and disbursing clerk; divisions of appointments, publications, and supplies; bureaus of foreign and domestic commerce, census, fisheries, navigation, and standards; coast and geodetic survey; lighthouse bureau; steamboat inspection service.

Department of Labor. — Bureaus: immigration, naturalization, labor statistics, and children.

In addition to these ten departments there are the following boards and commissions and agencies which deserve special mention: the interstate commerce commission, the civil service commission, the federal reserve board, the federal trade commission, the federal farm loan board, the United States employees compensation commission, the United States shipping board, the United States tariff commission, the United States bureau of efficiency, the United States railroad administration, the federal board for vocational education, United States board of mediation and conciliation, the Pan-American Union, and the Smithsonian Institution.

The Civil Service [1]

A vast army of civil employees in the executive service of the United States centred at Washington and scattered throughout the whole American empire is organized into a complicated hierarchy headed by the ten departmental officers who constitute the President's Cabinet.[2] The head of each department, as noted above, usually has a number of assistants. There are, for

[1] Every library should have copies of the annual report of the Civil Service Commission, which may be secured free of charge by addressing the Commission at Washington, D. C.

[2] For the "Spoils System," see above, pp. 139–140.

example, four assistant postmasters-general and three assistant secretaries of state. The administrative work of each department is distributed among a number of bureaus and divisions, each with a chief officer, generally speaking, responsible to some higher authority.[1] In each of the divisions or bureaus there are a number of clerks, technical experts, and employees serving in a variety of capacities. The total number of persons employed in the Interior Department, for instance, according to the secretary's report for 1908, was 18,770, of whom 4396 were in Washington. The officers and employees in the whole executive civil service on June 30, 1916, numbered approximately 416,000. Considering this vast army with regard to methods of appointment, we find that it falls into two groups: 296,000 admitted on examination, or under the competitive or merit system, and approximately 120,000 appointed without examination.

As we have seen above,[2] even the offices now filled by examination were formerly subject to the spoils system — that is, they were given principally to party workers without special consideration for their fitness and without any test of abilities. After some tentative experiments at reforming this spoils system,[3] Congress at length passed, in 1883, the Civil Service Act,[4] which is still the fundamental law governing the federal service. This Act provides for a Civil Service Commission composed of three persons, no more than two of whom shall be adherents of the same party, appointed by the President and Senate, and charged with the duty of aiding the President, as he may request, in preparing suitable rules for competitive examinations designed to

[1] The relation of bureau chiefs to heads of departments is no more scientifically worked out than the relation of heads of departments to the President. See above, p. 188.

[2] Page 139.

[3] Among these tentative measures were (1) the law of March 22, 1853, providing for the classification of certain clerks in Washington and requiring heads of offices to examine clerks before appointment — a law which proved to be little more than a farce; (2) the law of 1864, providing examination for thirteen consular clerks in the Department of State, and (3) the law of March 3, 1871, authorizing the President to prescribe regulations for admission into the civil service and to provide methods for ascertaining the fitness of candidates — a law which promised well under the administration of the great champion of civil service reform, George William Curtis, but fell to the ground in 1873, when Congress refused to make the necessary appropriations for its execution.

[4] *Readings*, p. 208.

test the fitness of applicants for offices in the public service, already classified or to be classified by executive order under the Act, or by further legislation of Congress. The Commission aids the President generally in the execution of the Act.

The Act itself ordered the Secretary of the Treasury and the Postmaster-General to make classifications of certain employees within their respective jurisdictions, and at the same time provided that the heads of certain departments and offices should, at the direction of the President, revise any existing classification or arrangement of their employees and include in one or more of such classes subordinate officers not hitherto classified. In other words, the Act itself brought a few offices under the "merit system," and left the extension of the principle largely to the discretion of the President and future acts of Congress.

When the law went into force it applied to only about 14,000 places which were then included in the classified service. The number has been steadily increased, principally by executive orders, until to-day far more than half of all of the offices in the executive civil service are filled by the process of examination and promotion under the civil service rules. During his administration, President Roosevelt issued a large number of orders extending the merit system. For example, in 1901–02, he extended the application of the rules to the rural free delivery service; in 1902, at the suggestion of the President, the employees in the census office were classified by act of Congress; in 1904 the positions in the forestry service were made competitive; and in 1905 the special agents of the immigration bureau on duty in foreign countries were included within the classified service.[1] This list of Mr. Roosevelt's extensions is by no means complete — it merely illustrates the way in which the President may steadily widen the range of the "merit system" by applying it to one group of government employees after another. When Mr. Roosevelt entered upon his administration there were about 100,000 officials in the classified service, and before the close of his second administration the number had increased to nearly 200,000.[2]

The Civil Service Commission, under the direction of the Presi-

[1] Reinsch, *Readings*, p. 698.

[2] There was, it must be remembered, a large increase in the number of government employees during this period.

dent, prepares the large variety of examinations required to test the fitness of candidates for the multitude of different offices. There is a chief examiner at Washington, and there are several hundred local boards of examiners scattered among the states and territories for the purpose of supervising local civil service examinations.[1] The Act orders that boards of examiners shall be erected at such points as to make it reasonably convenient and inexpensive for applicants to attend examinations.

The Act requires that such examinations shall be practical in their character, and, so far as may be, relate to those matters which will fairly test the relative capacity and fitness of persons examined to discharge the duties of that branch of the government service to which they seek to be admitted. In preparing the examination papers it is the practice of the Commission to ask the coöperation of the various departments; if a technical position is to be filled, the department concerned usually notifies the Commission, and very probably prepares the technical questions to test the fitness of candidates for the place.

The preparation of the examination papers for a large number of positions is relatively a simple matter, for about sixty-six per cent of federal offices covered by the merit system are clerical in character. Only about eleven per cent are reckoned as professional, technical, scientific, mechanical, and executive. About as many of the clerical positions are in the postal service as in all the other branches of the federal administration combined. These various positions are classified into groups arranged according to the minimum and maximum salaries paid in each; and for examining purposes they are separated into six divisions: clerical, technical, executive, mechanical, sub-clerical, and miscellaneous. In 1919 Congress instituted measures designed to bring about a complete reclassification of salaries and grades on the basis of the duties performed by the employees.[2]

Any citizen of the United States may apply for an examination admitting him to the federal service.[3] For a long time, owing to

[1] These local boards are composed of federal officers detailed for this occasional work.

[2] See below, p. 228.

[3] Full information may be secured by directing a request to the Civil Service Commission, Washington, D. C. Citizens are excluded on the following grounds: mental or physical incapacity, excessive use of intoxicants, service in the army or navy, dismissal from public service for delinquency during the preceding year, and criminal or disgraceful conduct.

the lax methods prevailing, aliens were often admitted to government employment, but within recent years the requirement of citizenship has been quite rigidly enforced. Applicants for examination are not even charged a fee, in spite of the fact that the Civil Service Commission has several times recommended the establishment of a nominal charge for the purpose of excluding the many thousands of ill-prepared persons who take the examinations in a gambling spirit — nothing to lose and possibly something to gain.

Through these examinations the Civil Service Commission must keep its registers of eligibles full, so that it can supply men of the most diverse training and experience when called upon by the several departments. On the same day, there may be demands for clerks, stenographers, expert chemists, patent examiners, draftsmen, interpreters, and postal clerks; and the Commission must be ready at once with a list of persons duly qualified for such positions.

When called upon, the Commission selects from the proper register and transmits to the department concerned, the names of three candidates at the head of the list, who are (if possible) residents of the state wherein the appointment falls.[1] From this list of three any one may be selected by the appointing officer, and the other names are returned to the Commission to be replaced upon the register. If the appointing officer refuses to accept any one of the three, he must give satisfactory reasons for his action. Every successful candidate is put on probation for a period of six months; then if his record is good his appointment is made permanent.

It should be noted, however, that there are certain exceptions to the operation of the rules in the matter of making appointments. (1) Preference is given to persons honorably discharged from the military or naval service; and, unless by direction of the Senate, no person who has been nominated for confirmation by the Senate shall be required to be classified or to pass an examination. (2) Appointments to the public service in the depart-

[1] It will be noted that "inferior" officers, under the Constitution, may only be appointed by the President alone, the heads of departments, or the courts, as Congress may determine. As a matter of fact the vast majority of inferior officers are appointed by heads of departments under Civil Service rules.

ments at Washington shall be apportioned among the several states and territories and the District of Columbia upon the basis of population — a principle which it is impossible to carry out in practice.[1] (3) In general, private secretaries to the heads of departments, assistants, bureau chiefs, and attorneys and persons called upon to fill emergency employments are exempt from examination.[2]

The process of removal from the federal service after appointment is a relatively simple matter. The rules require that no person shall be removed from a competitive position, "except for such causes as will promote the efficiency of the service." When the President or head of an executive department[3] is convinced that any employee in the classified service is incapable or inefficient, he may remove such employee after notice and hearing have been accorded the employee in question. Whenever a subordinate officer recommends to the head of an executive department the removal or reduction in grade of some employee, the head of the department must give notice to the employee and give him a chance to be heard. The Civil Service Commission[4] contends that the complaint frequently heard to the effect that unfit men are protected against removal by the rules is untrue. "On the contrary," says the Commission, "the power of removal for unfitness is with the head of the office. The appointing officer being responsible for the efficient performance of the work of his office, it rests with him to determine whether such cause exists as to require the removal of an employee in order to promote the efficiency or discipline of his office."

The courts do not interfere in cases of removal, on the ground that the right of appointing involves the right of removal and

[1] A clause was attached to the census bill of 1909 designed to eliminate many frauds connected with residence claims.

[2] The exemptions include a long list of officers filling five printed pages of the Civil Service Report: two private secretaries to the head of each executive department and one to each assistant head, one private secretary to each of the heads of bureaus filled by the President and Senate, all persons appointed by the President without confirmation of the Senate, attorneys and persons receiving not more than $300 in compensation, appraisers at the ports of Boston, New York, and Philadelphia, all persons in the army transport service, and so forth.

[3] With regard to his own subordinates, of course.

[4] *Twenty-fourth Annual Report* (1908), p. 87.

that the Civil Service Act limits the power of removal in only one instance — refusal to contribute money or service to a political party. In practice, however, whenever a large number of employees of the same political faith are removed from office, it is presumed that the removal was for political reasons, and the officer making the removals is required to show that just cause existed for each removal; but the courts will not intervene.

Promotions as well as appointments in the federal service are based upon the merit system. Competitive examinations are established to test the fitness of candidates for advancement and a list of eligibles is kept. Candidates for promotion may use, in support of their claims, recommendations from their chiefs.

Notwithstanding all the efforts made to put the civil service upon the "merit" basis, many abuses grew up in practice in spite of the spirit of the law. It was found by a casual examination: (1) that employees doing the same work and of substantially the same experience and time of service were paid radically different salaries; (2) that employees doing work calling for different qualities and experience were paid the same salary; (3) that discriminations were often made against women in the government service; (4) that the same title was frequently fixed to positions utterly unlike as to the work required of the incumbents; and (5) that wage and salary schedules, in addition to being inconsistent and inequitable in themselves, were far below the same schedules outside of the government service. The discovery of such conditions led to the appointment, in 1919, of a joint commission on salaries and grades to review the situation in several important departments and make constructive recommendations to Congress.

Partisanship and Political Activities

In making promotions, removals, and reductions in rank it is very difficult to exclude partisan politics from consideration, but attempts have been made by act of Congress and presidential orders to protect employees in the classified service from undue political influence, and also to withdraw them from too great activity in partisan politics. The original Civil Service Act provides that no person in the public service is for that reason under any obligations to contribute to any political fund or to render any political service, and that he shall not be removed or

otherwise prejudiced for refusing to do so. Furthermore, no person in the public service has a right to use his authority to coerce the political action of any person. No recommendation by a Senator or a member of the House of Representatives, except as to the character or residence of an applicant, can be lawfully received or considered by any person concerned in making examinations or appointments under the Civil Service Act. Members of Congress and executive, judicial, military, and naval officers are forbidden to be involved in soliciting or receiving political assistance or contributions from any officer employed by the United States or from any person receiving compensation from the United States.[1] The practice of soliciting campaign contributions in the buildings occupied by branches of the federal government is likewise forbidden by law.

Other forms of political activities, however, were left by the Act to the control of the heads of departments, and from time to time executive and departmental orders were issued for the purpose of eliminating abuses arising from the active participation of inferior office-holders in party affairs. At length, in 1907, political activity in the broadest sense was placed under the supervision of the Civil Service Commission by an amendment to the rules, adopted by the President, providing that "all persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns." This rule has been construed by the Commission to forbid the use of official positions for the benefit of any political party; and since its adoption it has been interpreted to prohibit the following types of political activity: "Service on political committees, service as delegates to county, state, or district conventions of a political party, although it was understood that they were not 'to take or use any political activity in going to these conventions or otherwise violate the civil service rules'; continued political activity and leadership; the publication of a newspaper in the interest of a political party; membership in a club taking an active part in political campaigns and management; the circulation of petitions having a political object; service as a com-

[1] There is, no doubt, more or less violation in practice.

missioner of elections in a community where it was notorious that a commissioner of elections must be an active politician." [1]

The principle of permanent tenure involved in the merit system of appointment raises the question as to what shall be done with government employees who have passed the age of efficient service. It is only possible to keep the civil service up to a high standard by constantly recruiting it from able young men in the prime of life. This throws upon the officer responsible for administration the unwelcome duty of reducing the pay and the rank of the older men or discharging them altogether. If these older men are kept in service, it is frankly out of a generous appreciation of their condition. They are not only inefficient themselves, but by holding high places which they have won by meritorious services they block the way for the promotion of capable and energetic younger men. "No man," said the quartermaster-general recently, "with the slightest appreciation of the loyalty of these old, tried, and faithful employees will urge that they should be discharged, and a reduction in salary is so disheartening to them as to render nugatory their services after such action. No matter how kindly the necessity is explained to them, reduction is a severe blow. . . . If they are retained in the grades attained by merit in the period when they could and did do all or more than their duty, the effect on the younger clerks who then do the work is depressing in the extreme. Some provision for retiring the old clerks ought to be made. More good effects on administration would probably come through provision for retirement than any other one action that could now be taken, and its effect would doubtless prove as beneficial as did the establishment of the merit system." [2]

President Taft took this view of the situation in his message of December 7, 1909, in which he declared that, in spite of the opposition to the establishment of civil pensions, which had naturally grown out of the heavy burden of military pensions, he was strongly convinced that no other practical solution of the difficulties presented by superannuation in the civil service could be found, than that of a system of civil pensions.

[1] *Report of the Civil Service Commission* (1908), p. 10.
[2] *Annual Report* (1905), p. 65.

CHAPTER XII

THE CONGRESS OF THE UNITED STATES

THE Congress of the United States is composed of two houses: a Senate representing the commonwealths in their corporate capacities, and a House of Representatives apportioned among the states according to their respective populations. Two leading motives were responsible for the adoption of this bicameral system. In the first place, it was necessary to secure the support of the smaller states for the new Constitution by granting them equality of power in one branch of the federal government. In the second place, the Fathers believed that some check was necessary upon the impulses and passions of the more popular body. Then, of course, they had before them the examples of the English Parliament and their colonial assemblies.

The House of Representatives

The number of members in the House of Representatives is fixed by Congress, subject to the limitation that it shall never exceed one for every 30,000 of the population. The first House consisted of sixty-five members, and, with one exception (the reapportionment of 1842) the number has been regularly increased until it has now reached 435. At each recurrence of the decennial apportionment there is a strong pressure on Congress to add more members to the already unwieldy assembly. This is due to the fact that those states whose populations have increased only slightly, or not at all, are unwilling to have their representation reduced in order that the rapidly growing states may receive the proportion due them under the numerical rule. It must be noted also that with the growth of population the number of inhabitants in each congressional district has increased enormously, from about 33,000 in 1793 to about 200,000 at the apportionment of 1911. This makes a constituency of great size when compared with the parliamentary district in England or in France.

A member of the House of Representatives must be a citizer of the United States of at least seven years' standing; he must be not less than twenty-five years old and an inhabitant of the state in which he is chosen. He cannot be at the same time a military or civil officer of the United States; and nearly all of the states have, by law or constitutional provision, forbidden their officers to hold positions of trust under the federal government. Some states have gone further and provided that each member must be a resident of the district which he represents; but this restriction is regarded by most lawyers as unconstitutional, because it adds a qualification to those imposed by the federal Constitution.[1]

As a matter of fact, however, it is practically an unwritten law that the member must be a resident of his district, although there are a few exceptions, as for example in New York, where down-town constituencies are often represented by men residing in up-town districts. Mr. Bryce has summarized the reasons for the adoption of this general custom as follows: State pride, of course, will prevent a district from going outside of the commonwealth for its Representative; the member of the House is relatively well paid, and the party in the district does not want to waste the post on strangers, but prefers to reserve it to strengthen the local organization; owing to the vast amount of party work required by our complicated system, it is necessary to have as many offices as possible to reward the workers; the Representative in Congress is expected to know and primarily represent local needs and to secure harbor and river appropriations, post-office buildings, special protection for industries and other favors for his constituents, for Americans regard the Representative as a spokesman of local interests rather than as a statesman, "formulating reason and justice into law." It is, therefore, highly improbable that any change will be made in this unwritten law, at least in the near future, notwithstanding the fact that it often excludes able men from Congress because talent is not distributed by nature according to congressional districts.

While it seems clear that states cannot add qualifications to those imposed by the federal Constitution on members of Congress, it is conceded in practice that either house, in the exercise of its constitutional powers to be judge of the elections, returns,

[1] But it is difficult to see how it could be set aside by legal process.

and qualifications of its members, may exclude persons on other grounds than those laid down in the Constitution.[1] For example, in 1900, the House excluded Mr. Brigham H. Roberts of Utah on the ground that he was a polygamist. The committee reporting in favor of this action contended: "Must it be said that the constitutional provision, phrased as it is, really means that every person who is twenty-five years of age and who has been for seven years a citizen of the United States and was when elected an inhabitant of that state in which he was chosen, is eligible to be a member of the House of Representatives and must be admitted thereto even though he be insane or disloyal or a leper or a criminal? Is it conceivable that the Constitution meant that crime could not disqualify? The whole spirit of the government revolts against such a conclusion."

The minority of the committee reported, however, against this view, declaring: "The adding by this House alone of a disqualification not established by law would not only be a violation of both the Constitution and the law, but it would be a most dangerous precedent which could hardly fail to 'return to plague the inventor.' . . . What warrant have you, when the barriers of the Constitution are once broken down, that there may not come after us a House, with other standards of morality and propriety, which will create other qualifications with no rightful foundations? . . . It will no longer be a government of laws but of men. To thus depart from the Constitution and substitute force for law is to embark upon a trackless sea without chart or compass."[2] This view was also held by those who claimed that the proper way of getting rid of Mr. Roberts was to admit him to membership and then expel him under the right to eject by two-thirds vote; but the party of exclusion triumphed.

The Constitution provides that no person holding any office under the United States shall be a member of either house during his continuance in office. Under this provision several army officers have been excluded from the House of Representatives. For example, in 1803, Mr. John P. Van Ness, a Representative from New York, was appointed major of the militia under the authority of the United States in the District of Columbia, and

[1] It has been done, however, in only a few cases.

[2] Hinds, *Precedents of the House of Representatives*, Vol. I, pp. 527 ff.

the committee on elections in the House declared by unanimous vote that by his acceptance he had forfeited his seat. The practice of Presidents in frequently appointing members of the Senate and House as commissioners to negotiate treaties and make investigations has raised the question as to whether members of Congress can legally accept such positions. The judicial committee of the Senate in reviewing this matter came to the conclusion that "a member of a commission created by law to investigate and report but having no legislative, judicial, or executive powers, was not an officer within the meaning of the constitutional inhibition."[1]

Members of the House of Representatives are apportioned among the several states[2] according to their respective numbers, counting the whole number of persons in each state, exclusive of Indians not taxed — subject, however, to the limitation that each state must have at least one Representative. Until 1842, Congress left the states to their own devices in election methods, but in that year the Apportionment Act provided, "that in every case where a state is entitled to more than one Representative, the number to which each state shall be entitled under this apportionment shall be elected by districts composed of contiguous territory, equal in number to the number of Representatives to which said state may be entitled, no one district electing more than one Representative." It is now the rule of Congress to require that congressional districts shall be composed of "contiguous and compact territory containing as nearly as practicable an equal number of inhabitants," each district electing only one Representative, except in the case that, if the state legislature fails to carry out this exact provision, certain or all of the members may be elected at large on a general ticket.[3]

Notwithstanding the intention of Congress to provide for substantially equal congressional districts, our state legislatures have succeeded in creating, principally for partisan purposes, the gross-

[1] Hinds, *Precedents*, Vol. I, p. 604.

[2] Alaska, Hawaii, and Porto Rico have one delegate each in the House of Representatives, and the Philippine Islands have two delegates. These delegates have seats in the House, and may speak there, but they have no vote.

[3] See *Readings*, p. 218. Congress has, in a few instances, specially authorized election on a general ticket.

est inequalities. On comparing the total number of votes cast in congressional districts, we find the greatest discrepancies. For example, in 1906, a Mississippi district with a population of 232,174 cast 1540 votes, while a New York district with a population of 215,305 cast 29,119 votes. In New York in 1906 there were 58,190 voters in the twenty-third congressional district, and only 13,862 voters in the ninth congressional district. These differences, of course, are not due entirely to the gerrymander, for representation is not based on the number of voters, but on the population.

Even in the matter of population, however, there are great discrepancies. The fifteenth congressional district (Republican) in New York (1905) had 165,701 inhabitants, while the eighteenth (Democratic) had 450,000 inhabitants. These discrepancies are partially due to the necessity of recognizing units of local government such as counties, townships, and city blocks, in laying out the districts, but they are more especially due to the desire of the majority party in each state legislature to secure as many of its members as possible in Congress.

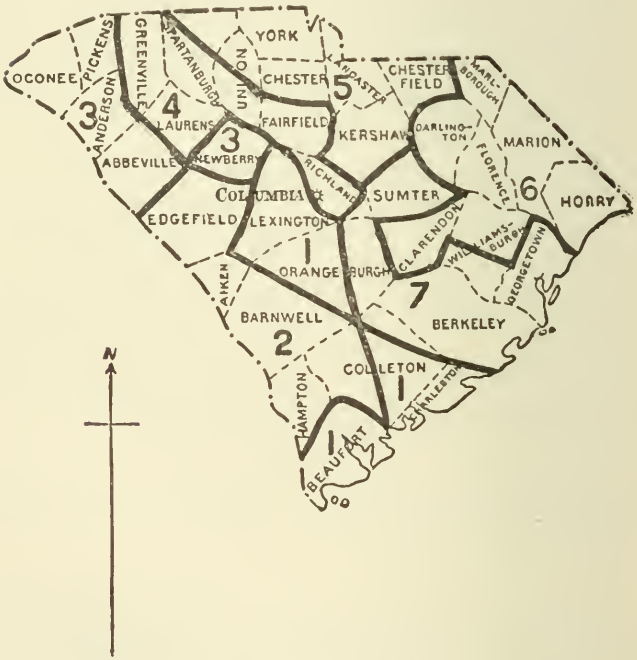
This misuse of the power of creating congressional districts, known as "gerrymandering," [1] has been devised as a means by which a dominant party can make its own vote go as far as possible in congressional elections and cause its opponent's vote to count for as little as possible. This is done by massing the voters of the opposing party in a small number of districts, giving them overwhelming majorities there, while allowing the dominant party to carry the other districts by very small minorities. Gerrymandering is responsible for some curious political geography. There is, for example, the famous "shoestring district" in one of the southern states where gerrymandering has been used to counteract the effect of the negro vote. There was at one time in Illinois the "saddle bag" district comprising "two groups of coun-

[1] The term "gerrymander" originated in Massachusetts. It appears that Elbridge Gerry, a distinguished Democratic politician of his day, was instrumental in redistricting his state in such a way that one of the districts had the shape of a lizard. When an artist saw the map of the new district, he declared, "Why, this district looks like a salamander," and gave it a few finishing touches with his pencil. The editor, in whose office the map was hanging, replied, "Say rather a gerrymander," and thus an ancient party practice was given a new name. See *Readings*, p. 219.

ties at different sides of the state so connected as to crowd as many Democratic counties as possible into one district and thus secure Republican seats in nearby districts by eliminating the vote of hostile localities."[1] The Democrats in Indiana by a shrewdly arranged gerrymander were enabled to elect, in 1892, eleven congressmen with a total vote of 259,190, leaving only two congressmen to the Republicans, who cast a vote of 253,668, thus requiring 126,834 Republican votes, as against 23,565 Democratic votes, to elect one congressman.[2]

The district system under the gerrymander has frequently resulted in the grossest misrepresentation of party strength in the

CONGRESSIONAL DISTRICTS, SOUTH CAROLINA, 1890.



An illustration of "compact and contiguous territory."

[1] Reinsch, *American Legislatures*, p. 202.
[2] Commons, *Proportional Representation*, 2d ed., p. 61.

House of Representatives. For example, in 1894, the Republicans, with a vote of 5,461,202, elected 245 Representatives; the Democrats, with 4,295,748 votes, elected 104 Representatives, and the Populists, with 1,323,644 votes, elected 7 Representatives, while the Prohibitionists, with 182,679 votes, elected none. In this election the Republicans, with 48.4 per cent of the total vote, elected 68.8 per cent of the members, while the Democrats, with 38.1 per cent of the vote, elected 29.2 per cent of the members, and the Populists, with 11.7 per cent of the vote, secured only 2 per cent of the members. Taking the vote as a whole on a strict basis of equality of representation, the Republican majority of 134 should have been a minority of 7 as against all other parties.[1]

The term of the member of the House is two years — a short period which has received so much criticism recently that it is difficult for us to understand the necessity that led the authors of *The Federalist* to apologize for the action of the Philadelphia convention in not providing for annual elections. The system of biennial elections, coupled with the practice of not assembling a Congress until more than a year after its election, has had a most unfortunate effect upon the character of that body. Ordinarily, when members take their seats,[2] their term of office is practically half expired; and within a year, if they expect to continue in Congress, they must enter into a campaign for renomination and election. This may have a double effect. It diverts the attention and energy of the member from his official duties, and, if he is defeated, it leaves him disgruntled and more subject to pernicious influences. It is a well-known fact also that no member of Congress can exert a considerable influence during one term of service, since it requires a great deal of practical experience to discover the mysteries of congressional procedure and get a hearing from the leaders in the House.[3] On the other hand there is no provision for a dissolution of the House or recall of members, and long terms might result in Congress frequently misrepresenting the country.

The time, place, and manner of holding elections for Represent-

[1] Commons, *Proportional Representation*, p. 58. It must be noted, however, that the basis of representation is not the vote, but population.

[2] Unless there is an earlier special session.

[3] *Readings*, p. 254.

atives may be prescribed by the state legislature subject to the provision that Congress may at any time by law make or alter such regulations. For almost a hundred years congressional elections were held at different times and according to the different methods prevailing in the various states — the old system of viva voce voting being retained for a long time in some commonwealths. At length, Congress, by laws passed in 1871 and 1872, provided that congressional elections should be by ballot and that they should occur throughout the Union at the same time, that is, on the Tuesday following the first Monday in November. An exception to the uniformity rule allows a few states to hold their elections somewhat earlier, according to their former custom.[1]

Party machinery has been developed in every state for nominating candidates to the House of Representatives. Where the older methods have not been overthrown by primary legislation, candidates are nominated by district conventions of delegates representing units of local government within the congressional districts, such as counties in the regions more thinly populated, and assembly districts, townships, or wards in the more thickly settled areas. In a large number of states, however, including Wisconsin, Nebraska, Oregon, Kansas, and Oklahoma,[2] the convention system has been abolished altogether, and an official direct primary election is provided for each party. Any member of any party who wishes to be a candidate for Congress must have his name put on the party primary ballot by petition, and at the primary election the party voters are given the opportunity to select from among the several candidates on this ballot.[3] Representatives-at-large are nominated by state conventions or by state primaries.

The House of Representatives and the Senate are the judges of the election, returns, and qualifications of their own members, and therefore contested elections are not determined by a judicial tribunal as in England. The House has three committees on

[1] On the qualifications for voters for Representatives, see above, p. 162, and below, chap. xxii, and *Readings*, p. 399. They are merely the qualifications requisite for electors of the most numerous branch of the state legislature.

[2] See below, chap. xxx.

[3] When a vacancy occurs in the House of Representatives by the death or resignation of a member, or in some other way, a special election is held.

elections,[1] whose duty it is to investigate election contests. The law requires any person intending to contest an election to serve notice on the member whose seat he claims, and to specify the grounds upon which he expects to rely. The member whose seat is contested must answer. Copies of the papers are transmitted to the House, and the clerk makes up the records of the case, which he reports to the House. These are referred by the Speaker to one of the three committees on elections; testimony is taken; the contestants are given an opportunity to be heard, and to be represented by counsel; and on the basis of the evidence and pleadings, the committee presents to the House a report, which is usually accepted.[2] Inasmuch as each committee on elections is composed of a majority of members from the dominant party, a contested election, where the case is not too glaring, is quite likely to be decided in the interests of that party.

The Senate

The Constitution prescribes that there shall be two Senators from each state, and in the Amendment clause it provides that no state, without its consent, shall be deprived of equal representation in the Senate. This rule of absolute equality grew out of the fear of Maryland, Connecticut, and Delaware that the great commonwealths of New York, Pennsylvania, and Virginia would override them in federal matters; and out of apprehension entertained by the agricultural and slave-owning states that the numerical strength of the manufacturing and commercial states would lead to discriminating legislation. The result of this equality of representation in the Senate is a most glaring violation of the democratic principle of distributing representation with some regard to population. Thus it comes about that nine eastern states, Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, and Pennsylvania, with a population of over 21,000,000 (1900), have only eighteen Senators; while nine western states, Montana, Wyoming, Colorado, Utah, Idaho, Washington, Nevada, Oregon, and California, with a total population of less than 4,000,000, have the same number. New York, with over 7,000,000 inhabitants,

[1] The Senate has one committee on elections.
[2] The committee practically has the power of a court of law.

has two, while the nine western states, with a little over half the inhabitants, have nine times the representation. Indeed, it is possible to select fifteen of the smaller states, with about 5,000,000 inhabitants, possessing fifteen times the weight of the state of New York in the Senate. "The senatorial representatives of those 5,000,000 would lack only a single vote of the number necessary to defeat some great treaty which the Senators of the other 70,000,000 might support. States having less than one-sixth of the population choose a majority of the entire Senate, while more than five-sixths of the people of the country are represented by a minority of that body. The state of Nevada under the last census had less than 43,000 people. If New York were permitted to have the same proportional representation in the Senate, it would have some 350 Senators."[1] In practice, however, we do not find an alignment of the Senators of the small states against those of the large states.

The qualifications of the Senator are fixed by the Constitution. He must be not less than thirty years old, an inhabitant of the state for which he is elected, and a United States citizen of nine years' standing. The same question has arisen here as in the case of the House of Representatives,[2] whether the Senate, under its power to judge of the qualifications of its members, can add any to those fixed in the Constitution. The correct answer to this question seems to have been made by Mr. Hopkins, in a speech of January 11, 1907, on the proposition to exclude Mr. Reed Smoot of Utah, on the ground that he was a polygamist. Mr. Hopkins says that neither the Senate, Congress, nor a state can add to the qualifications prescribed by the Constitution; that the power given to the Senate is not to create Senators, but to judge whether they have the qualifications prescribed by the Constitution; that the Senate has no constitutional authority to inquire into the antecedents and early career and character of a Senator who applies for admission with the proper credentials of his state; that no Senator has ever been denied a seat in the Senate of the United States because of any lapse of career prior to his election by the state; and that the Senate should content itself with the exercise of its power to

[1] Reinsch, *Readings*, p. 139.

[2] Above, p. 233. It will be noted that the Senate did not adopt the practice of the House, which was regarded as unconstitutional in many quarters.

expel a member for disorderly behavior whenever his conduct is such as to lower the standard of that body or bring it into disrepute.

Previous to 1913, Senators were elected by the state legislatures, and, until 1866, Congress left the several commonwealths to their own devices as to procedure; but in that year, Congress, under its power to determine the time and manner of electing Senators, prescribed a uniform method to be followed by all legislatures. It provided that the legislature, immediately preceding the expiration of the senatorial term, should proceed to elect the member on the second Tuesday after its meeting.[1] Each house first took a viva voce vote separately and if any person received a majority of the whole number of votes cast in each house, he was declared elected; in case no person received a majority at the separate balloting, or in case either house had failed to act as required by law, the two houses then met in joint assembly and elected by viva voce vote and majority count. Failing an election on the first day, the joint assembly then met every succeeding day at noon and cast one ballot until a Senator was elected.[2]

Notwithstanding this formal provision of law, United States Senators were really selected by party caucus — where the system of direct nominations had not been adopted. That is, whenever there was a vacancy in the Senate, or the term of the Senator was about to expire, it was the practice of the members of the party having a majority in the legislature which was to elect to meet in caucus and agree in advance upon the candidate, whose nomination was then merely ratified by the formal vote in the legislature.

"Deadlocks" were of frequent occurrence, however, in our state legislatures. One of the most famous occurred in the Pennsylvania legislature in 1899, when, on January 17, it began balloting for the purpose of selecting a successor to Senator Quay, cast daily ballots until April 19, and then adjourned the following day without having effected an election. A still longer and more notorious contest was waged in Delaware by

[1] *Readings*, p. 221.

[2] The same method of election was followed in the case of a vacancy caused by death or resignation. The certificate of election had to be sent by the governor of the state to the President of the United States Senate.

Mr. J. E. Addicks, whose fight in the legislature lasted, with intermissions, from 1895 to 1903.

The disgraceful conflicts in state legislatures when deadlocks occurred, the extensive use of money in elections by rich men, who, all too frequently, bought their way into the Senate, and the growing belief, whether justified or not, that the Senate represented the "plutocracy" of the country, contributed to accelerate a movement for direct election of Senators by popular vote. This proposal had been made in Congress as early as 1826; it was favored by President Johnson, and it was steadily pressed forward in the House of Representatives during the last quarter of the nineteenth century. In 1893, it received the requisite majority of two-thirds in the lower chamber, but it met death in the upper house.

Three more times the House passed the resolution, but the Senate remained obdurate. Eloquent speeches were made against it by leading men like Senator Hoar, of Massachusetts. Mr. Hoar declared that popular election would transfer the seats of power to "the great cities and the masses of the population," and that it would "result in the overthrow of the whole scheme of the Senate and in the end the whole scheme of the national Constitution as designed by the framers." He scorned the idea that the Senate had been a citadel of privilege and asserted that on the contrary it had been the real guardian of liberty while resisting the popular passions of the House.

The refusal of the Senate to accede to the proposal only increased the popular belief in the desirability of the change. The Populist platform of 1892 declared in favor of it; the Democratic party added its approval in its official programme of 1900 and in succeeding platforms; and in 1908 Mr. Taft, in his acceptance speech, stated that he was personally in favor of it, although the principle was not in the platform of his party. The legislatures of more than two-thirds of the states passed resolutions in support of popular election and many joined in asking Congress to call a convention to submit the amendment to the states.

Many states refused to wait on the tardy action of the amending process of the federal Constitution, and proceeded to accomplish the desired result by applying the direct primary [1] to

[1] The history of the movement for popular election of Senators up to 1905 is concisely summarized by Professor G. H. Haynes in the Political Science

the nomination of candidates for the Senate and in one way or another inducing the state legislatures to accept the popular choice. By 1912 United States Senators were nominated by primaries [1] in the following states: Alabama, Arkansas, California, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and Wisconsin. The laws for accomplishing this radical reform (which was incidentally contrary to the letter and spirit of the federal Constitution) varied widely in the different states; but under all of them the legislature was supposed to ratify the will of the voters expressed at the polls.

The popular election of Senators under the several state laws soon began to make a change in the attitude of the Senate itself toward the proposed reform, and at length in 1911 a resolution in favor of the reform passed that body. Some differences arose with the House of Representatives over the extent of the control to be exercised by the federal government over senatorial elections on account of the objection of southern members to federal interference and it was not until 1912 that the contest was ended by the final passage of the resolution by Congress. The vote in the lower house, taken in April, was 296 in favor and 16 against; the Senate shortly afterward passed the resolution by a safe margin. The resolution was speedily ratified by the requisite number of state legislatures, and was declared in force, on May 31, 1913.

The amendment provides that the two Senators from each state shall be "elected by the people thereof for six years. . . . The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature. When vacancies happen in the representation of any state in the Senate, the executive authority of the state shall issue writs of election to fill such vacancies: Provided that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

Quarterly for December, 1905; see also his volume on the subject; for both sides of the question, see *Readings*, p. 226.

[1] See below, chap. xxx.

Under this amendment it was necessary for the states to make provision for the nomination of candidates. Those commonwealths having direct primary laws applicable to Senators simply continued them in force. The remaining states retained the convention system. If any state fails to make the requisite provision for the popular election of Senators, Congress may act under Article I, section 4, of the Constitution.

The term of the Senator is fixed at six years, and in practice Senators are far more frequently reëlected than members of the House of Representatives. At least five Senators, Benton of Missouri, Morrill of Vermont, Allison of Iowa, Jones of Nevada, and John Sherman of Ohio, served thirty years or more. The tendency toward reëlection seems to be more marked in the smaller states, perhaps because competition is not so keen, and it is easier for a Senator to maintain his influence over the legislature.

The terms of all the Senators do not expire at any one time, for the Senate is a continuous body, one-third of the members going out every two years, and, except in extraordinary cases arising from deadlocks, resignation, or death, it seldom happens that a state legislature is called upon to elect two Senators at the same time. At the first session of the Senate in 1789, that body divided its membership by lot into three classes, the seats of the first class being vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, thus making way for a renewal of only one-third of the Senate biennially.

Members of the Congress of the United States are entitled to certain privileges by virtue of their position. First among these may be reckoned compensation. The Constitution provides that Senators and Representatives shall receive a compensation for their services, to be ascertained by law and paid out of the treasury of the United States. Up until 1855, it was the custom to pay members a certain per diem allowance;[1] in that year a salary of $3000 per annum was voted; this amount was raised to $5000 in 1865; and increased in 1873 to $7500 — an increase which met such a public protest that it was repealed at the next session. In 1907, however, the salary of Senators and Representatives was again fixed at $7500 per annum, to which

[1] A salary was voted in 1816, but the law was speedily repealed.

is added an allowance for clerk hire, stationery, and travelling expenses.[1]

The second privilege enjoyed by members of Congress is freedom from arrest during their attendance on the sessions of their respective houses, and in going to and returning from the same, in all cases except treason, felony, and breach of the peace. This privilege, as Story points out, exempts Representatives and Senators from all processes, the disobedience of which is punishable by imprisonment. That is, a congressman, during the period mentioned above, cannot be compelled to testify in a court, serve on a jury, or respond to an action brought against him. The term "breach of the peace," however, extends to "all indictable offences, as well those which are in fact attended with force and violence as those which are only destructive to the peace of the government"; and, therefore, the member of Congress really enjoys no exemption from the ordinary processes of the criminal law. In going to and coming from Congress the member is allowed reasonable delays and reasonable deviations from the nearest course.

The third privilege enjoyed by members of Congress is freedom of speech during debate. The Constitution expressly provides that for any speech or debate no member of either house shall be questioned in any other place. This famous right, supposed by some persons to have been designed to guarantee full and free discussions of public matters in debate, is really derived from the practices of the English Parliament, where it was originated to protect the members against arbitrary arrest for criticism of the king. According to Professor Ford, it was placed in the American Constitution to protect members against responsibility to their constituents.[2] The effect of this privilege is to free the members from the liability to prosecution for libel or slander for anything said in Congress, or in committees, in official

[1] In 1907 Congress enacted a law forbidding corporations to make contributions to campaign funds in federal elections. In 1910 and 1911 Congress enacted laws requiring candidates for federal offices to make public their receipts and expenditures both before and after primaries and elections. A candidate for the House of Representatives may expend $5000 and a candidate for the Senate may spend $10,000. Apparently their friends may spend an unlimited amount. *The American Year Book* (1911), p. 189.

[2] *Rise and Growth of American Politics*, p. 63.

publications, or in the legitimate discharge of their legislative duties. Members of Congress also constantly act upon the supposition that the privilege includes the right to circulate their speeches, not only among their own constituents, but anywhere throughout the United States.

The internal organization of each house of Congress is limited by certain provisions of the Constitution.[1] The Vice-President of the United States is made the presiding officer of the Senate;[2] neither house can expel a member for a breach of its rules except on a two-thirds vote, a quorum being present; each house must keep a journal of its proceedings and publish the same from time to time, except such parts as it may deem necessary to keep secret; if one-fifth of the members present in either house demand a record of the yeas and nays upon the journal with regard to any question, that record must be taken by roll-call. Subject to these limitations, each house has the right to elect its own officers, compel the attendance of members, and prescribe rules of procedure and discipline.

The power of Congress, in the course of its proceedings, to interfere with private citizens — a power which has, in times past, caused many serious constitutional conflicts in England — is clearly limited by our Constitution: neither house has any general power to punish outsiders for contempt, for such a power is judicial in its nature.[3] Whenever the examination of private citizens, however, is necessary to the performance of regular legislative duties, it would appear that Congress may require the attendance of witnesses, and compel them to give testimony.[4] Each house may also punish its own members for disorderly behavior, and, with the concurrence of two-thirds, expel a member; but it has been held by the Court that the power of Congress to punish its members or private citizens is confined to the session in which the condemnation occurs, and cannot extend beyond imprisonment during the remainder of that session.

The quorum necessary to do business in each house[5] is fixed

[1] Burgess, *Political Science and Constitutional Law*, Vol. II, p. 56.

[2] He has no vote save in case of a tie.

[3] *Readings*, p. 138.

[4] Reinsch, *American Legislatures*, p. 176.

[5] When the House is once organized, the quorum consists of a majority of those members, chosen, sworn, and living, whose membership has not been

by the Constitution at a majority of all the members, but a smaller number may adjourn from day to day, and are authorized to compel the attendance of absent members. This question of the quorum is no formal matter. It is necessary to fix the number at a majority of the members in order to prevent "snap" legislation by minorities, but the rule is often attended with serious inconveniences.

For a long time it was a common practice for the minority party in the House of Representatives, whenever it desired to delay business, to refuse to answer the roll-call, and thus frequently compel an adjournment, on the ground that there was no quorum present, until a quorum could be mustered. To stop this "filibustering," as these dilatory tactics were called, Speaker Reed, in January, 1890, held that members present in the House and declining to answer should be counted present in determining the question of a quorum. Shortly afterward the House embodied this principle in a rule authorizing the clerk, on demand of a member or at the suggestion of the Speaker, to count as present those physically present but refusing to answer the roll-call. The present method of marshalling a quorum and dealing with delinquent members is illustrated by this brief extract from the *Congressional Record:* —

Mr. Williams: Mr. Speaker, I make the point of order that there is no quorum present. . . .

The Speaker: The Sergeant-at-Arms will close the doors and bring in the absentees, the clerk will call the roll, and those in favor of the passage of the bill will, as their names are called, answer 'aye,' and those opposed will answer 'no,' and those present and not voting will answer 'present.' . . .

Assistant Sergeant-at-Arms Pierce: Mr. Speaker, in accordance with the rules of the House and the warrant of the Speaker, I present at the bar of the House, under arrest, Mr. Buckman and Mr. Rucker.

The Speaker (pro tempore): The gentlemen will be noted as present and discharged from arrest.

. . . Does the gentleman from Minnesota desire to vote?

Mr. Buckman: I vote 'aye.' [1]

vacated by resignation or by the action of the house. Hinds, *Precedents*, Vol. IV, p. 62. When a point of order is made with regard to the quorum it must be that no quorum is present, not that no quorum has voted. *Ibid.*, p. 79.

[1] *Congressional Record*, Vol. XL, part 8, p. 7585 (59th Cong., 1st Sess.).

The Constitution requires an annual session of Congress, and provides that it shall begin on the first Monday in December, unless Congress, by law, shall appoint a different day. Each Congress, therefore, has normally two sessions. The first, known as the long session, begins in December of each odd year, 1923, 1925, 1927, etc., and extends theoretically until the following December, though as a matter of practice it is usually adjourned sometime in the spring or summer — in 1890 the long session was not adjourned until the first of the following October. The second session of each Congress begins in December of each even year, 1922, 1924, 1926, etc., and extends until the following March 4. Every Congress, therefore, expires at noon on March 4 of each odd year, thus giving the President at the very opening of his administration a new Congress. By postponing the session until autumn the President has time to prepare for his legislative duties.

It will be noted that, according to this arrangement, a member of the House of Representatives does not take his seat until more than a year after his election; that is, he is elected in November of the even year, and, unless a special session is called, does not begin his legislative work until one year from the December immediately following. Thus it happens that an expiring House lasts for about four months after the election of the members of the new House, and an important measure may be passed by a party which the country has voted down at the preceding election. Congress may, accordingly, enact laws opposed to the latest expression of popular will. "Under the present law," said Mr. Shafroth, formerly a member of Congress, "a Representative in Congress who has been turned down by the people legislates for that people in the second regular session. A man who has been defeated for reëlection is not in a fit frame of mind to legislate for the people. There is a sting in defeat that tends to engender the feeling of resentment, which often finds expression in the vote of such members against wholesome legislation. That same feeling often produces such a want of interest in proceedings as to cause the members to be absent nearly all the second session. . . . It is then that some are open to propositions which they would never think of entertaining if they were to go before the people for reëlection. It is then that the attorneyship of some corporation is often tendered, and a vote is after-

ward found in the *Record* in favor of legislation of a general or special character favoring corporations."

Special sessions of Congress may be called by the President under his power to convene either house or both of them on extraordinary occasions. Unlike the governors of many states, however, he cannot limit the special session to the consideration of any particular matters. Special sessions have been held many times, the most noteworthy occasion being the call of July 4, 1861, to prepare for the Civil War. The special session called by President Wilson in the spring of 1919 lasted until the opening of the regular session in December. The Senate is often called at the beginning of a new administration to confirm appointments.

No provision is made in the Constitution whereby members of Congress can be instructed by their constituents, and it is held by many American publicists that a representative, though chosen by a district, is in reality a member of a national legislature bound to act on broadly national grounds. In practice, however, this theory is not always observed, for Senators and Representatives are often instructed by the legislatures of their states in solemn resolutions.[1] There is, of course, no penalty for violating these instructions, because the state legislature cannot compel the resignation of a member of Congress. Nevertheless every congressman is extremely sensitive to the wishes of the leaders of his party in his community.

The difference in the organization of the two houses makes it necessary to say a few words by way of comparison.[2] The Senate is, of course, the smaller body, being composed of ninety-six members, as against 435 members in the House of Representatives. The Senate, generally speaking, is also composed of older men and men of wider political experience. The Senators as a rule have been in some branch of state government or in the House of Representatives. As the term of service is longer and the chances for reëlection greater, the Senate usually contains a relatively larger number of political experts, acquainted not only with the problems of law-making, but also with the inner workings of the federal government. The influence of the Senators is also augmented by their position as party leaders

[1] *Readings*, p. 233.

[2] For the original purpose of the Senate, see *Readings*, p. 222.

within their respective states. They have, as we have seen, a large power in appointing to federal office; and sometimes they are able to construct political machines of extraordinary strength.[1] They usually have great weight in selecting delegates to national party conventions, and in fact they are largely responsible for the predominance of the federal office-holding element in those assemblies. This command over party resources within their states enables the Senators to bring more or less pressure on the members of their party in the House of Representatives. When the state organization, in close touch with its Senator or Senators, adopts a policy, it is usually wise for the member of the House of Representatives, if he expects further party favors, to fall in line with the policy.[2]

This connection between the Senate and political leadership has resulted in bringing into that body a large number of men whose principal claim to the office is the power to manipulate the state political machinery. "The dominating influence of the Senate in this matter was never more clearly shown than in the Republican convention of 1900. Both the temporary and the permanent chairmen were Senators; the four nomination speeches were made by Senators; and there were seven Senators on the most important committee, that on Resolutions, which drafted the national platform. The National Committee appointed by the convention contained five Senators, among them Hanna (as chairman) and Quay. The advisory council appointed by the National Committee had three senatorial members, among them Platt and Depew; while Hanna, Quay, and Scott were members of the Executive Committee. So well organized was the senatorial group at this time, that the selection of the presidential candidate was largely determined by their discretion, both in 1896 and in 1900."[3]

The political power of the Senate is greatly augmented by its control over treaties and appointments.[4]

The Senate also derives no little influence through the connection of some of its members with those powerful economic interests which have operated largely through the extra-legal polit-

[1] *Readings*, p. 128.

[2] See Article by H. L. Nelson, "The Overshadowing Senate," Century, Vol. LXV, p. 513.

[3] See Reinsch, *American Legislatures*, p. 121. [4] See above, pp. 191, 196.

ical organizations of the state.[1] "It is natural," says Professor Reinsch, "that the Senators should look upon political matters from the vantage ground of their special experience and of the interests with which they have been connected. There need be in this no suspicion of direct corruption; there may, in fact, often exist a conviction of absolute impartiality. Yet their attitude of mind and of temper is nevertheless characterized by that conservatism — often exaggerated — of the man to whom is intrusted the management of great economic interests. . . . There are Senators whose controlling purpose seems to be to protect and advance the interests of particular combinations of capital without any regard to the broader principles of statesmanship or even to their plain duty as representatives of the commonwealth." [2] On the other hand, President Woodrow Wilson believes that the Senate "represents the country, as distinct from the accumulated populations of the country, much more fully and much more truly than the House of Representatives does." [3]

How far the above conclusions concerning the character of the Senate, written during the period of election by state legislatures, now hold good is a matter of opinion. Signs are not wanting, however, that popular election of Senators has worked a marked change in that house. Candidates for the Senate under a system of direct election must perforce make a popular campaign, and the type of man who is most efficient in formulating programmes that will arouse public sentiment will undoubtedly win in a majority of cases over the more reserved and less resourceful leader. The quiet and thoughtful man of larger intellectual powers is likely to be overborne by the whirlwind campaigner or astute manipulator of federal patronage.

Whatever may be the conclusion on this point, there can be no doubt that the Senate is assuming an ever larger share in shaping federal legislation. The almost unlimited debate in the Senate enables each member to hold up legislation, and especially appropriation bills, in favor of any particular interest which he may represent. Though the Constitution provides that revenue bills shall originate in the House of Representatives, as a matter of

[1] See Goodnow, *Politics and Administration*, pp. 251 ff.
[2] *American Legislatures*, p. 124.
[3] *Constitutional Government in the United States*, p. 116.

fact the Senate, as we shall see, has an equal, and in many instances a far greater power. As a matter of practice, also, the Senate usually increases the House appropriations, thus violating the ancient principle that burdens should be laid by those who are nearest to the tax-payers. The technical skill of the Senators, their long experience, and their superior legal talents frequently enable them to overshadow the House as a law-making body. Furthermore, owing to their relatively small number, they are able to give to measures more careful consideration; and for this reason some of the best of our legislation, at least on the technical side, comes from the Senate rather than from the House.

CHAPTER XIII

THE POWERS OF CONGRESS

THE Congress of the United States is limited to the exercise of the powers enumerated in the Constitution and the use of the means necessary and proper to carry them into execution. In this regard, it stands in sharp contrast to the English Parliament — King, Lords, and Commons. The power and jurisdiction of that great assembly, as Blackstone tersely puts it, "is so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds. . . . It hath sovereign and uncontrolled authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding laws concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal. . . . It can regulate or new model the succession to the crown, as was done in the reign of Henry VIII and William III. It can alter the established religion of the land, as was done in a variety of instances in the reigns of Henry VIII and his three children. It can change and create afresh even the constitution of the kingdom and of Parliaments themselves, as was done by the act of Union and the several statutes for triennial and septennial elections. It can in short do everything that is not naturally impossible, and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament. True it is, that what Parliament doth, no authority upon earth can undo."

Compared with this omnipotence, the powers conferred upon Congress by the Constitution seem few indeed; and, as a matter of fact, most of the great questions which have agitated Great Britain during the last century — the extension of the suffrage, the regulation of factories and labor, the provision of popular education, the establishment of old-age pensions — do not come within the range of federal authority at all, but are consigned to state legislatures and constitutional conventions. Nevertheless, Congress enjoys no slight power, and the swiftly multiplying interstate relations, over which it has a wide authority,

are rapidly extending its control to social and economic matters of the most fundamental character.

This restriction of legislative power by written law has a profound influence on the debates and deliberations of Congress, because every important controverted measure before that body is sure to be declared unconstitutional by some one. A measure may be wise, expedient, and even necessary, but if it is clearly outside the powers of the legislature, it is useless to discuss it. If, however, there is any doubt as to the constitutionality of a measure, it is sure to be the subject of searching inquiry and exposition on the part of the skilled lawyers in Congress. Some of the greatest legislative discussions in our national history, including the celebrated Webster-Hayne debate on Foote's Resolution, have been over questions of constitutionality. It often happens that the original proposal itself is lost sight of in the tortuous windings of historico-legal speculations, as was indeed the case in the controversy just mentioned. The tendency to lengthy constitutional disquisition is especially marked in the Senate, where debate is less restricted, and there are more lawyers of distinction than in the House. These discussions are often of a high order and of undoubted value in expounding the terms of the Constitution, but they are also quite as often mere displays of black-letter lore or personal vanity. More than once the country has been impatient at these diffuse lucubrations, rightly suspecting that many opposing members had first come to their conclusions on the merits of the bill under consideration, and then sought constitutional objections to it. More than once, also, these debates have only added confusion to what seemed perfectly clear and simple. "If we must wait until the great constitutional lawyers agree upon any subject," exclaimed Mr. Bourke Cockran in the House, "it is plain that we would never take a step in any direction. We would stand paralyzed at the threshold of every legislative enterprise, amazed and bewildered — puzzled to distinguish amid the din of their vociferation how much of it is advice to us and how much of it is denunciation of each other. I defy any man to define Congress itself according to the constitutional lawyers, after he has read three of their speeches." [1]

[1] Reinsch, *Readings*, p. 256.

Broadly speaking, there are three views of the Constitution which may be taken by any member of Congress in deciding upon a controverted constitutional question. The first of these is known as "strict construction," — a view which would restrict the powers of Congress to the bare letter of the written instrument, and confine the means of carrying its powers into execution to those absolutely and imperatively necessary. This theory of interpretation was applied by Jefferson in his opinion on the constitutionality of a federal bank,[1] and was later used with great acumen by his party as the moral justification for their opposition to the Federalists.[2] During the long controversy over slavery, it was the chief reliance of southern statesmen in resisting the northern pressure on Congress to use its powers as fully as possible in restricting the spread of slavery to the territories. With the disappearance of the old party antagonisms since the Civil War, there have not been many occasions to call the strict construction view into party services. The Democratic party, it is true, occasionally appears to oppose the encroachments of federal authority, but its concrete legislative proposals can hardly be regarded as consonant with a narrow conception of the Constitution.

The second view of the powers of Congress, originally assumed by the Federalist party and taken on various occasions by all parties, as their interests have required, is that of "liberal construction." The adherents to this doctrine deny that there is any warrant in the Constitution for taking the narrow view, and they lay great stress on that clause of the Constitution which authorizes Congress to make all laws necessary and proper for carrying into execution the powers expressly enumerated. They accordingly take a generous view of the enumerated powers, and then interpret the words "necessary and proper" to mean "highly useful and expedient."[3] Under this construction, a national bank was created, American industries have been protected, national highways built, paper money issued, and irrigation, reclamation, and other large schemes of public improvement undertaken.[4] Only under this conception of the Constitution has the federal government been made in any way adequate to the exigencies of a national system of economy.

[1] *Readings*, p. 237.
[2] *Ibid.*, p. 93.
[3] *Ibid.*, p. 240.
[4] *Ibid.*, pp. 66 and 241.

The third view of the proper attitude to be taken by Congress in considering the constitutionality of any legislative proposition, and one which has been quite generally taken, consciously or unconsciously, by the liberal constructionists, was thus stated by Mr. Bourke Cockran, during a debate in the House: "It seems to me that the duty of Congress is to examine closely the condition of the country and keep itself constantly informed of everything affecting the common welfare. Wherever a wrong is found to exist with which the nation can deal more effectively than a state, it is the business of Congress to suggest a remedy. . . . Our first step must be in the direction of legislation. The only way we can ascertain definitely whether a law which we believe will prove effective is constitutional or unconstitutional is not by abandoning ourselves to a maelstrom of speculations about what the Court may hold or has held on subjects more or less kindred, but to legislate, and thus take the judgment of the Court on that specific proposal. We can tell whether it is constitutional or unconstitutional when the Court pronounces upon it and not before. Even if the Court declares it unconstitutional, its decision will not reduce us to helplessness. When it drives us from establishing a remedy by legislation, it will, by that very act, direct us to propose a remedy by constitutional amendment. Having framed a suitable amendment and proposed it to the legislatures of the states, our duty will have been accomplished. The final step toward full redress will then be with the bodies most directly representative of the people affected by the wrong."[1]

Although the important functions of Congress will be treated more in detail in the chapters which follow, it seems desirable to give here, even at the risk of some repetition, a general survey of all the powers vested in our national legislature. Such a presentation does more than satisfy the theoretical requirements of an academic presentation of the subject. A general view of all the powers of Congress is simply indispensable to an understanding of current politics, for questions of constitutionality underlie all of our political controversies over the powers of the federal and state governments, over centralization and state rights, over national and local reforms. Such a survey is rendered especially necessary by the altogether too widespread confusion which

[1] Reinsch, *Readings*, p. 256.

exists among citizens as to the nature of the federal system. Every student of American government should have definitely and clearly fixed in mind the various powers conferred upon Congress — not as mere rules of law, but as great principles of political practice controlling the national legislature in its manifold relations to the life of the people in every territory and commonwealth of the American empire.

I. In relation to revenue and expenditures, Congress has the power to lay and collect taxes, duties, imposts, and excises, and to appropriate money, in order to pay the debts and provide for the common defence and general welfare of the United States.[1] This power is not unlimited. Indirect taxes, duties, imposts, and excises must be uniform throughout the United States —that is, must be imposed at the same rate on the same article wherever found.[2] Poll taxes, taxes on real and personal property, and other direct taxes,[3] except income taxes from all sources, must be apportioned among the states according to population. Congress cannot tax exports from a state, and under an interpretation by the Supreme Court cannot tax the "necessary instrumentalities" of a state government, such as the salaries of state and local officers, and state and municipal bonds. Appropriations for the army cannot be made for a period of more than two years, but otherwise the power of Congress to spend money is only controlled by its discretion.[4]

II. In respect to national defence,[5] the powers of Congress are practically unlimited, except by the provision that the President shall be commander-in-chief and that military appropriations shall not be made for a greater period than two years. Congress can raise and support armies, create and maintain a navy, and provide for the organization and use of the state militia. Congress also declares war, grants letters of marque and reprisal[6]

[1] See below, chap. xviii.

[2] *Readings*, p. 323.

[3] *Ibid.*, pp. 327, 328.

[4] The account given here is based largely on Burgess, *Political Science and Constitutional Law*, Vol. II, chap. vii.

[5] Below, chap. xvii.

[6] "Privateering" (among the powers concerned) was abolished by the Declaration of Paris in 1856. While the United States did not sign that Declaration, it no longer grants letters of marque and reprisal.

authorizing officers or private parties to capture property and persons subject to a foreign power; and makes rules concerning captures on land and sea.

The question of adequate military defence was raised and carefully discussed at the time of the adoption of the federal Constitution. Numbers 2–5 of the *Federalist* are devoted to the "dangers from foreign force and influence." The Constitution was drafted with such dangers in view. Accordingly Congress can call every able-bodied man into the national service. This power was demonstrated by the passage of the draft acts of 1917 and 1918. When the constitutional question was raised in the Supreme Court, the answer was clear: such measures are within the scope of the authority conferred upon Congress (245 U. S. 366). There also is no limit to the amount of money which can be appropriated for military purposes. Moreover, the states are subject to the federal government, for they can keep no standing army or ships of war in time of peace without the consent of Congress. In answer to the charge that such an unlimited power might lead to despotism, the defenders of the Constitution urged: "With what color of propriety could the force necessary for defence be limited by those who cannot limit the force of offence? If a federal constitution could chain the ambition, or set bounds to the exertions of all other nations, then, indeed, it might prudently chain the discretion of its own government and set bounds to the exertions for its own safety." [1]

III. In respect to commerce and business,[2] Congress may regulate commerce with foreign countries, among the several states, and with the Indian tribes; make uniform laws on the subject of bankruptcy throughout the United States; fix the standards of weights and measures; protect authors and inventors by a system of patents and copyrights; and establish post-offices and post-roads. Commerce not only includes the transportation of commodities; it embraces traffic and intercourse in all of its important branches, such as the transportation of passengers, the transmission of telegraph messages, and the carrying of oil through pipe lines.[3] It is sometimes stated that the power of regulating interstate and foreign

[1] *The Federalist*, No. XLI.

[2] See below, chap. xix.

[3] *Readings*, p. 343.

commerce is vested exclusively in Congress, but the difficulty of determining when a state law constitutes such a regulation is so great that the mere statement does not carry any very concise information.[1] The power of Congress over bankruptcy is not exclusive; the states may legislate on the subject. The federal law, however, takes precedence in case of a conflict with the provisions of a commonwealth law, and Congress by an act of 1898 has covered the entire domain of bankruptcy.

With regard to weights and measures Congress could, if it saw fit, establish a uniform metric system throughout the United States, but it has only gone so far as to make the use of this system lawful, not obligatory.[2] Meanwhile the regulations of the various states prevail, although the federal government aids in securing scientific exactness by maintaining in the Department of Commerce an important bureau of standards, the functions of which are the custody of the standards, the comparison of the standards used in scientific investigations, engineering, manufacturing, commerce, and educational institutions, with the standards adopted or recognized by the government; the testing and calibration of standard measuring apparatus; the solution of problems arising in connection with standards; the determination of physical constants, and the properties of materials which are of particular importance in science and manufacture. To facilitate the spread of uniform systems throughout the United States, the bureau is authorized to assist not only the federal government, but also state and municipal governments, educational institutions, and private concerns engaged in manufacturing or other pursuits requiring the use of standards. The latter are charged a fee for services rendered.

The protection of authors and inventors by a system of copyrights and patents is intrusted to Congress; but it is contended by some publicists that this power is concurrent and may be exercised by any state so long as its laws do not contravene the express provision of the federal law. This point, however, has not been authoritatively adjudicated.[3]

For administrative purposes Congress has created a bureau of

[1] *Readings*, p. 348.

[2] Electric measures have been made uniform, however.

[3] The power of Congress over trade-marks extends only so far as they are involved in interstate and foreign commerce.

patents in the Department of the Interior, headed by a commissioner, who administers the patent laws, issues patents for new inventions and improvements, and registers trade-marks, prints, labels, and the like.[1] The working staff of the patent office is divided into a number of separate groups, each one of which has charge of some particular device or invention. Every application is recorded and referred to the appropriate group, which makes a search to see whether the claim is for a new invention and does not interfere with a prior patent. Nearly every inventor employs an attorney, although he is not required to do so, to assist him in prosecuting his claim. If an application is rejected, the applicant may appeal to the commissioner of patents and from his decision he may prosecute an appeal to the courts. If a patent is granted, it runs for a period of seventeen years, and extensions are sometimes made. Patents are promptly reissued, however, to remedy defects in the original specifications. The number of patents granted in 1800 was 41. The number of letters patent for the year ending June, 1918, was 39,941, exclusive of trade-marks, labels, etc.; in that year the number of applications for patents for inventions was 59,615.[2]

The copyright law has been steadily extended to new devices, until it now covers not only books, but also works of art, maps, charts, musical compositions, and the like.[3] For more than a century Congress extended copyright protection only to citizens and residents of the United States, and during that time American publishers, with a few honorable exceptions, regularly "pirated" the works of foreign authors, that is, published them in the United States without paying any royalty or other compensation. Under the act of March 3, 1891, it was at last provided that the citizens of any foreign state which gives to citizens of the United States the benefit of copyright on practically the

[1] The first patent law was passed in 1790; in 1836 the office of commissioner of patents was created; and in 1849 the patent bureau was transferred to the Departments of the Interior.

[2] Reference: *Report of the Commissioner of Patents*, an annual publication.

[3] The term of a copyright is twenty-eight years with a possible renewal for twenty-eight years. Rights are secured not only to authors and inventors, but also to their heirs and assigns. Law of March 4, 1909.

same basis as their own citizens, may be given the privileges of our copyright laws. As a result, citizens of the United States may claim the protection of foreign countries coming under the terms of the act, and citizens of foreign countries in turn may obtain the protection of our laws. The administration of the copyright law is in the hands of the registrar of copyrights, who works under the direction of the librarian of Congress.[1] Every applicant receives his copyright, for no attempt is made by the division of copyrights to examine into questions of infringement as in the case of patents.

While the power to establish post-offices and post-roads is separately conferred upon Congress, it may be regarded, for practical purposes, in connection with the power to regulate commerce. The establishment of post-offices and post-roads is exclusively a federal matter, and it must be noted that the power of the federal government covers the whole domain of mail transportation, within each state as well as among the states.[2]

IV. The direct power of Congress, as a body, over foreign relations is slight, because the President and Senate have the treaty-making power, and the President is our official spokesman in the conduct of all business with foreign countries. Congress, however, may, as we have seen, regulate foreign commerce, including the important branch of immigration; create consular and diplomatic posts abroad and provide the emoluments thereunto attached; define and punish piracies and felonies committed on the high seas and offences against the law of nations. Congress may also establish a uniform rule by which the subjects of foreign powers may become citizens of the United States. While this power of prescribing the conditions for naturalization is regarded as being vested exclusively in Congress, it must be remembered that the states may, and many of them do, confer on aliens the right to vote.[3]

V. The regulation of the monetary system is vested exclusively in the federal legislature.[4] Congress has power to coin money, regulate its value, and the value of foreign coin. States are for-

[1] Reference: *Report of Copyright Legislation* by the Registrar of Copyrights (1904) — a government publication.

[2] See below, p. 394.

[3] See *Readings*, p. 144.

[4] See below, p. 374.

bidden to coin money, emit bills of credit, or make anything but the gold and silver coin of the United States a tender in the payment of debts. There is nothing in the Constitution expressly authorizing Congress to create paper money, but it has exercised this power and has been sustained by a decision of the Supreme Court.[1]

VI. The power of Congress to define crimes and provide punishments for them is narrowly limited. The high crime of treason, as indicated above,[2] is expressly defined in the Constitution: it consists only in levying war against the United States, adhering to its enemies, or giving them aid and comfort. Congress cannot therefore make any offence which it chooses treason. Congress may provide for punishing counterfeiters and persons committing crimes on the high seas or offences against the laws of nations.[3] "These are the only crimes committed within the commonwealths," says Professor Burgess, "concerning which Congress has the power to legislate;" but it should not be forgotten that in the exercise of its express powers, Congress may define certain crimes against federal laws and provide penalties. For example, it has provided punishment for theft and other offences connected with the transportation of mail matter. If Congress did not have this power of penalizing offenders against federal law, the authority of the United States government would be nullified.[4] Hence we may say that Congress may define crimes against federal laws duly passed under the terms of the Constitution, although it has no power of defining crime in general. This power is left to the states; it is for them to determine what particular classes of actions shall be deemed crimes, and as a result we have the greatest divergences, — certain actions being crimes in one state and innocent in others. In this respect the American federal system differs fundamentally from the German system, for the German national legislature has the power to regulate the whole domain of civil and criminal law and judicial organization and procedure.

[1] See *Readings*, p. 241.

[2] Above, p. 149.

[3] Congress may of course define crimes in the territories and districts directly under the government of the United States.

[4] *Readings*, p. 244. The distinction should be noted, however, between a code of criminal law and ordinary laws with penal sanctions attached.

VII. The government of the territories and districts belonging to the United States is vested in the federal authorities. Congress has the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, to exercise exclusive legislation in all cases whatsoever over the District of Columbia, and over all places purchased by the federal government (with the consent of the state legislatures concerned) for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. In the exercise of this authority over territories and districts, Congress combines the power of the federal government with that of a state government, subject to the fundamental limitations in the Constitution which forbid it to do some things that states are not forbidden to do — for example, establish a press censorship or official religion.[1] The right to admit new states and supervise the organization of territories into states is also vested in Congress; and the process to be followed in the admission or organization of a new state is left to the determination of that body.[2]

VIII. Notwithstanding the theory of the separation of powers, Congress may to some extent control the various executive departments by statutes regulating even the minutest duties of the Cabinet officers. As we have seen, the Constitution merely hints at the existence of the executive departments; but the power to determine the number of such departments and to provide for the internal organization of each is, nevertheless, exercised by Congress. How far it may use this authority to control the President's high personal advisers is a matter of dispute that cannot be settled by any abstract definitions;[3] but it may exercise a substantial dominion over executive departments under its power to fix salaries and define duties.

IX. Congress may also exercise in practice a large power over the federal judiciary, notwithstanding the theoretical independence of that branch of the government; because it may determine the number of Supreme Court judges, fix their salaries, subject to certain limits, and define their appellate jurisdiction. The creation of inferior federal courts is subject to its power; and it may define the jurisdiction and procedure of these courts and provide the methods by which cases may be drawn from the state courts

[1] See below, p. 418.] [2] Below, chap. xxii.] [3] See above, p. 215.]

into the federal courts. A notable example of the exercise of the power of Congress over our federal judicial system is afforded by the Judiciary Act of 1789, providing, among other things, the way in which state statutes could be brought into the federal courts, and their validity tested.[1]

Another important power vested in Congress is that of providing the precise manner in which the acts, records, and judicial proceedings of each state shall be given full faith and credit in every other state.[2]

X. In addition to controlling, to a limited extent, the federal judicial system, Congress itself enjoys the power of removing the civil officers of the United States by the process of impeachment,[3] but in practice this power is of slight importance. In trying cases of impeachment, the Senate acts as the high court.[4] When the President of the United States is being tried, the Chief Justice of the Supreme Court presides. It requires a two-thirds vote of the members present to convict.

The power of preferring and prosecuting charges against offenders is vested in the House of Representatives. In practice, whenever the House decides to bring any federal officer before the bar of the Senate, it adopts, by resolution, articles of impeachment charging the particular offender with certain high crimes and misdemeanors and enumerating with more or less detail his particular offences. It thereupon chooses leaders to direct the prosecution before the Senate, and the case is then conducted very much in the form of a trial in an ordinary court. The prosecution states its case; witnesses for and against the accused are heard; and attorneys on both sides make their arguments. When the case is fully presented the Senators vote, and if two-thirds of the members present concur in holding the accused guilty, he stands convicted; but in case of failure to secure the requisite two-thirds, he is acquitted.

The penalty which the Senate can impose upon any person

[1] On the power of Congress over the judiciary, see below, p. 294.

[2] See above, p. 158.

[3] On this subject see the careful survey, "The Law of Impeachment in the United States," by Professor D. Y. Thomas, Political Science Review for May, 1908, pp. 378 ff.

[4] Technically, however, it only sits as the Senate. In 1868 it ceased to call itself "a high court of impeachment."

convicted in case of impeachment is strictly limited to the removal of the offender from office and the imposition of a disqualification to hold and enjoy any office of honor, trust, or profit under the United States. Any person convicted, however, is still liable, after his removal from office, to indictment, trial, judgment, and punishment for his offence according to law. It is not obligatory upon the Senate to disqualify the convicted person from entering the federal service in the future, but in any case he must be immediately removed from office.

The jurisdiction of the Senate as a court of impeachment extends only over the President, Vice-President, and the civil officers of the United States, and over the offences of treason, bribery, or other high crimes and misdemeanors. Treason is, of course, defined in the Constitution; and the meaning of the term "bribery" is clear to all. The phrase "other high crimes and misdemeanors," however, is somewhat vague, and Congress might give a loose interpretation to it, even going so far as to treat the neglect of official duty as a ground for impeachment. Nevertheless, a conservative interpretation has generally been placed upon this phrase, so as to limit the offences, which render an officer liable to impeachment, to crimes and misdemeanors as understood in the ordinary law of the land.[1]

[1] The Senate has sat as a Court of Impeachment in the cases of the following accused officials, with the result stated and for the periods named:

William Blount, a Senator of the United States from Tennessee; charges dismissed for want of jurisdiction, he having previously resigned; Monday, December 17, 1798, to Monday, January 14, 1799.

John Pickering, judge of the United States district court for the district of New Hampshire; removed from office; Thursday, March 3, 1803, to Monday, March 12, 1804.

Samuel Chase, Associate Justice of the Supreme Court of the United States; acquitted; Friday, November 30, 1804, to March 1, 1805.

James H. Peck, judge of the United States district court for the district of Missouri; acquitted; Monday, April 26, 1830, to Monday, January 31, 1831.

West H. Humphreys, judge of the United States district court for the middle, eastern, and western districts of Tennessee; removed from office; Wednesday, May 7, 1862, to Thursday, June 26, 1862.

Andrew Johnson, President of the United States; acquitted; Tuesday, February 25, 1868, to Tuesday, May 26, 1868.

William W. Belknap, Secretary of War; acquitted; Friday, March 3, 1876, to Tuesday, August 1, 1876.

Charles Swayne, judge of the United States district court for the

Federal military officers are exempt from this jurisdiction, being subject to courts-martial. Members of Congress are also exempt, for they are not technically "civil officers," and furthermore they are under the control of their respective houses — each house having the power to determine its rules and proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

XI. In carrying into execution the powers vested by the Constitution in the government of the United States or in any department or office thereof, Congress may make all laws which shall be deemed "necessary and proper." The courts have, in general, given a liberal interpretation to this phrase. The Supreme Court has repeatedly declared that Congress possesses the right to use any means which it deems conducive to the exercise of any express power. Said the Court in the case of Juilliard *v.* Greenman:[1] "The words 'necessary and proper' are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all the proper means which are conducive or adapted to the end to be accomplished and which, in the judgment of Congress, will most advantageously effect it."

northern district of Florida; acquitted; Wednesday, December 14, 1904, to Monday, February 27, 1905.

Robert W. Archbald, associate judge, United States Commerce Court, removed from office, Saturday, July 13, 1912, to Monday, January 13, 1913. *Congressional Directory* (1913), p. 160.

[1] 110 U. S. R., 421; *Readings*, p. 245.

CHAPTER XIV

CONGRESS AT WORK

To the average observer, Congress is a vast and complicated legislative organ, with rules, committees, and methods, beyond the ken of ordinary mortals; but a somewhat careful examination of the procedure of that body from day to day reveals certain principles and practices which, when properly grasped, make the working scheme of the organization fairly clear — at least clear enough for the citizen who does not intend to become a legislator but merely wishes to watch the operations of the national lawmakers with a reasonable degree of understanding.

Party Organization and Leadership in Congress

I. The first fact to be grasped is that the working methods of Congress are largely determined by the existence of two political parties — one, a majority in control of one or both houses and regarding itself as responsible for the principal legislative policies; the other, a minority, in opposition, bound under ordinary circumstances to criticise and often vote against the measures introduced and advanced by the majority. In England, the political party organization is carried frankly into the House of Commons, where the majority and minority sit facing each other, and where the government is avowedly that of the predominant party — a government of men, not even theoretically of constitutional law. In the United States, the party rules none the less, but its organization and operations are, as we have seen,[1] unknown to the formal law of the federal Constitution. It is true that the votes on measures in Congress are by no means always cast according to party divisions, but it is likewise true that the principal legislative work of a session is the work of the majority party, formulated by its leaders, and carried through under their direction.[2]

This is not all. Each party in the Senate and the House is

[1] Above, chap. vi.

[2] For the part of the President as political leader, see above, chap. ix.

organized into a congressional caucus,[1] in which is frequently determined the line of party action with regard to important legislative questions. It is in a party caucus before the opening of each Congress, that the majority in the House chooses the Speaker and the minority decides upon its leader whom it formally presents as a candidate for Speaker, knowing full well that he cannot by any chance be elected. It is in the caucus that the majority decides whether it will adopt the rules of the preceding Congress or modify them; and it is seldom that the decision of the caucus is overthrown. The caucus is definitely organized under rules by which party members are expected to abide, although there are often a few "insurgents" who insist on acting independently.

The exact weight of the caucus in determining party policy is difficult to ascertain. At times in our history, undoubtedly, the caucus has settled fundamental matters of public interest before they were introduced into Congress, but there was reason for believing that, during the first decade of the twentieth century, its influence was declining on account of the rise to power in each house of a few men whose long service, shrewdness in legislative management, and effective leadership, had placed them in control of the speakership and the great committees.

How this was working out in the Senate is indicated by this passage from a speech made in that body in 1908, by Senator La Follette. "I attended a caucus at the beginning of this Congress. I happened to look at my watch when we went into that caucus. We were in session three minutes and a half. Do you know what happened? Well, I will tell you. A motion was made that somebody preside. Then a motion was made that whoever presided should appoint a committee on committees; and a motion was then made that we adjourn. Nobody said anything but the Senator who made the motion. Then and there the fate of all the legislation of this session was decided. . . . Mr. President, if you will scan the committees of this Senate, you will find that a little handful of men are in domination and control of the great legislative committees of this body, and that they are a very limited number." [2]

[1] *Readings*, p. 247. The caucus is held behind closed doors, but its deliberations are seldom withheld from the public. Sometimes wide publicity is given to the action of the caucus.

[2] Reinsch, *Readings*, pp. 168–169.

In the House, the directing power seems to be unquestionably concentrating in the speaker, the majority members of the committee on rules, and the chairmen of the important committees.[1] The positive leadership of these men seems to be definitely recognized. They, and such party members as are of unquestioned weight in the House, are gradually working toward something like an inner council of government, in which they formulate the policies and bring the other party members into line by the many methods known to politics.[2]

Indeed, a few years ago a writer went so far as to say that the party caucus was merely held for the information of the leaders and was "intended rather to furnish a vent for excited feeling and to measure and sum up the relative strength of different opinions, than to frame a policy upon which the party will unite." But attempts were made, on the return of the Democrats in 1911, to give the caucus some real vitality. Undoubtedly it is more powerful now than twenty years ago.

The Mass of Business before Congress

II. The second important fact to grasp is that each session of Congress is confronted by an enormous amount of business — from five to twenty times as much as can be considered adequately. Any member may introduce as many bills as he pleases by handing them to the clerk if they are of a private nature, or to the Speaker if they are of a public character. He does not have to secure any permission in advance or assume any responsibility for them, even though they may involve heavy charges upon the public treasury.

This looks like a fair and simple practice, but in fact it is largely responsible for the extravagance and confusion that exist in the federal government and for the iron-bound methods that are followed in the procedure of the House. Inasmuch as each member has a large number of special appropriations for his own particular district, he is always willing to be generous with the claims of other members in return for a favorable consideration of his own. This practice of coöperating in securing appropriations is known as "log-rolling" — a term derived from pioneer

[1] It is difficult to say what has been the precise effect of the action of the House in making the committees elective. Below, p. 283.

[2] See Lowell, *Government of England*, Vol. I, pp. 448 ff.

times when frontiersmen helped one another in rolling logs, making clearings, and building cabins. It is owing to this system that national interests are largely subordinated to particular and local interests.

The way in which this pressure for appropriations operates can best be illustrated by the following list of bills relative to a single locality, introduced by one member some years ago: —

By Mr. Clark of Florida: A bill (H. R. 12293) to establish a fish hatchery and biological station in the Second Congressional District of Florida — to the Committee on the Merchant Marine and Fisheries.

Also, a bill (H. R. 12294) to establish a fish-hatching and fish-cultural station on the St. John's River, in the State of Florida — to the Committee on the Merchant Marine and Fisheries.

Also, a bill (H. R. 12295) to provide for the erection of a subtreasury building and the establishment of a subtreasury at Jacksonville, in the State of Florida — to the Committee on Public Buildings and Grounds.

Also, a bill (H. R. 12296) to provide for the erection of a public building at the city of Palatka, in the State of Florida — to the Committee on Public Buildings and Grounds.

Also, a bill (H. R. 12297) to require the Secretary of Agriculture to make monthly reports as to the sea-island cotton, pineapple, and orange crops — to the Committee on Agriculture.

Also, a bill (H. R. 12298) to extend the provisions of the existing bounty-land laws to the officers and enlisted men and the officers and men of the boat companies of the Florida Seminole Indian wars — to the Committee on the Public Lands.

Also, a bill (H. R. 12299) to extend to the veterans of the several Seminole Indian wars and to the widows of the veterans of the several Seminole Indian wars the benefits of the act of Congress of February 6, 1907 — to the Committee on Pensions.

Also, a bill (H. R. 12300) granting pensions to the soldiers of the different Seminole Indian wars and their widows — to the Committee on Pensions.

Also, a bill (H. R. 12301) to provide for and levy an import duty on Egyptian and other long-staple cotton imported into the United States from foreign countries — to the Committee on Ways and Means.

Also, a bill (H. R. 12303) for the relief of the State of Florida — to the Committee on War Claims.[1]

This is no exceptional list, and is not printed here for the pur-

[1] *Congressional Record* for December 6, 1909.

pose of criticising Mr. Clark, but only to indicate the nature of the system which has introduced into the House of Representatives a large group of astute wire-pullers whose tenure of position and standing with their constituents depend, not upon their high abilities for dealing with really great issues, but upon the success with which they may secure appropriations for selfish local interests — to use the congressional phrase, "get pork out of the public pork-barrel." [1]

It is idle, however, to criticise members of Congress, for they are not individually at fault. Any one of them who refused to join in this general scramble for the division of spoils would find himself speedily retired by the organized element among his constituents, and perhaps by the vote of his constituents, for they are generally prone to measure the achievements of their Representative by the amount of "pork" which he secures for the district. There is no use, let it be repeated, in criticising members of Congress. The *system*, as Professor Henry Jones Ford points out, is at fault.[2] As long as any member of Congress may introduce measures carrying a charge upon the public treasury and as many other bills and resolutions as he pleases, just so long will the log-rolling process continue, and the House of Representatives be so overwhelmed with business as practically to destroy its functions as a deliberative assembly.

The following measures were introduced into the House during the Fifty-ninth Congress: 26,154 bills, 257 joint resolutions, 62 concurrent resolutions, 898 simple resolutions, and 8174 reports. During this Congress, 692 public bills and 6940 private bills, principally pension measures, were passed. The power to select from this enormous mass before the House must be vested in the hands of some person or group of persons, for the selection cannot be made openly on the floor by any automatic process which brings every measure to the consideration of that body. These persons invested with the power of selection in the House must of necessity be leaders among the majority party, for that party assumes responsibility before the country for the results of a legislative session. In the House these leaders are the Speaker,

[1] In the days of slavery it was the practice to open up on certain days a barrel of pork and give each slave his portion. This appears to be the origin of the term. C. C. Maxey, National Municipal Review, December, 1919, p. 693.

[2] *The Cost of Government.*

the committee on rules, and the chairmen of the principal committees to which bills are referred; and the rules provide ways by which they can make selections of business for consideration and limit the amount of time which may be consumed in debate on each measure.

The Rules of the House of Representatives

III. The rules, therefore, must enable the presiding officer of the House to prevent the consideration of any motion introduced merely for the purpose of delaying business. They must limit, or make provision for limiting, the amount of time which may be consumed in debating any particular matter. They must provide some way in which the party leaders can force the consideration of certain measures whenever they see fit. These principles have slowly been evolved in the development of the House of Representatives, and are now written in the rules of that body.

1. In the first place, the Speaker of the House may refuse to put motions which he regards as dilatory; that is, designed merely to delay business.

The immediate cause for the adoption of this principle was the practice of filibustering[1] by the minority or by small groups. In the Fiftieth Congress, on one occasion, the "House remained in continuous session eight days and nights, during which time there were over one hundred roll-calls on the iterated and reiterated motions to adjourn and to take a recess, and their amendments. On this occasion the reading clerks became so exhausted that they could no longer act, and certain members, possessed of large voices and strenuous lungs, took their places. If this was not child's play, it would be difficult to define it. Then, again, when a measure to which the minority objected was likely to pass, the yeas and nays would be ordered." [2]

In the succeeding Congress, of which Mr. Thomas B. Reed was

[1] In ordinary use, the word "filibuster" means to act as a freebooter or buccaneer, but in parliamentary practice it means "to obstruct legislation by undue use of the technicalities of parliamentary law or privileges, as when a minority, in order to prevent the passage of some measure obnoxious to them, endeavor to tire out their opponents by useless motions, speeches, and objections." Frequently, the purpose of a filibuster is to call the attention of the country in an emphatic way to the policy of the majority.

[2] Reinsch, *Readings*, p. 238.

Speaker, the Republicans had only a narrow majority, and it soon became clear that the opposing party, by putting dilatory motions and refusing to answer to the roll-call on a quorum, could prevent the majority from doing any business at all. It was under these circumstances that Speaker Reed, in January, 1890, refused to put motions which he regarded as purely dilatory, and was sustained by the House.

Mr. Reed defended his ruling as follows: —

> The object of a parliamentary body is action, and not stoppage of action. Hence if any member or set of members undertakes to oppose the orderly progress of business even by the use of the ordinarily recognized parliamentary motions, it is the right of the majority to refuse to have those motions entertained and to cause the public business to proceed. Primarily, the organ of the House is the man elected to the speakership; it is his duty in a clear case, recognizing the situation, to endeavor to carry out the wishes and desires of the majority of the body which it represents. Whenever it becomes apparent that the ordinary and proper parliamentary motions are being used solely for the purposes of delay and obstruction; . . . when a gentleman steps down to the front amid the applause of his associates on the floor and announces that it is his intention to make opposition in every direction, it then becomes apparent to the House and the community what the purpose is. It is then the duty of the occupant of the Speaker's chair to take, under parliamentary law, the proper course with regard to such matters.

This principle was shortly afterward (1890) embodied in the rules, and the Speaker now has regular sanction for refusing to entertain purely dilatory motions. However, the constitutional right of a member to demand the yeas and nays cannot be denied even if the purpose is dilatory.[1]

2. In the second place the Speaker may count as present those members who are physically present but refuse to answer to their names on a roll-call for the purpose of compelling an adjournment in the absence of a quorum. This principle was established by Speaker Reed about the same time as the ruling on dilatory motions, and also embodied in the revision of the rules of that year.[2]

[1] On this important subject, see Hinds, *Precedents of the House of Representatives*, Vol. V, pp. 353 ff.

[2] See above, p. 247.

3. In the third place, the rules provide a method for automatically shortening debate by prescribing that the time occupied by any member in discussing a legislative proposition shall not exceed one hour. This limit was imposed in 1841, and at the time Senator Benton declared that it was "the largest limitation upon the freedom of debate which any deliberative assembly ever imposed upon itself, and presents an eminent instance of permanent injury done to free institutions in order to get rid of a temporary annoyance." It is difficult to see, however, in what way the House could meet the enormous pressure upon it, if any member from among the 435 could talk as long as he pleased on any measure.

A member may, if he chooses, yield a portion of his time to some other member or members wishing to speak on a measure, but he may occupy no more than one hour, except by obtaining unanimous consent. Neither may he speak twice upon the same measure unless he introduced it, or is the member reporting it from committee. When going into the committee of the whole,[1] the House fixes the time of debate, which cannot be extended by the committee; and in many other ways freedom of debate is arbitrarily limited.

4. In the fourth place, in order to enable party leaders to force the consideration of certain measures whenever they see fit, the following committees may report on the subjects enumerated practically at any time in the course of the procedure of the House, no matter what may be under discussion: the committee on rules may report on rules, joint rules, and order of business;[2] the committee on elections, on the right of a member to his seat; the committee on ways and means, on bills raising revenue; the committees having jurisdiction of appropriations, on the general appropriations bills; the committee on rivers and harbors, bills for the improvement of rivers and harbors; the committee on the public lands, bills for the forfeiture of land grants to railroad and other corporations, bills preventing speculation in

[1] The committee of the whole forms a convenient body for discussion and provisional voting on measures. In it, 100 constitute a quorum and the Speaker's chair is taken by some other member. Measures approved in it are reported to the House for formal adoption.

[2] It is always in order to call up for consideration a report of the committee on rules. The position of this important committee is considered below (p. 283) in connection with the Speaker.

public lands, and bills for the reservation of the public lands for the benefit of actual and bona-fide settlers; the committee on territories, bills for the admission of new states; the committee on enrolled bills, enrolled bills; the committee on invalid pensions, general pension bills.

The Senate also has its code of rules, but it has not adopted any of the drastic methods obtaining in the House.[1] When the Senate rules were revised in 1806, the right to move the previous question, and thus close debate summarily, was omitted, and all attempts to restore control failed until 1917. At the session convened in March of that year, the Senate found all business blocked by an apparently endless debate. In the discussion of a proposed treaty with Colombia, more than 1400 nominations to positions in the federal service were held up awaiting confirmation. By a certain irony of fate the Democrats who had always been the most ardent champions of free debate were forced to insist upon some method of cutting it off. Acting on the recommendation of a committee composed of an equal number of members from both parties, the Senate adopted a new rule providing that: (1) on petition of sixteen senators a motion to cut off discussion on any bill can be served on the House and (2) if adopted two days later by a two-thirds vote it will bring the debate to an end, after each member has enjoyed the right to speak for not more than one hour on the pending measure. After such a closure is adopted amendments to the bill under consideration can be made only by unanimous consent.

The new rule, however, is not often brought into play, but it is always ready for use. Debate is still more prolix in the Senate than in the House, the Senators preferring to rely upon a sense of propriety, rather than upon an absolute rule, to bring discussion within the bounds of reason. Knowledge that there is a closure rule acts as a check upon filibustering tactics. The provision requiring a two-thirds vote to apply it ordinarily prevents any drastic and unfair use of the instrument. The long debate on the treaty of peace in 1919 is proof that the new rule does not seriously hamper the right of members to a free and full expression of their opinions.

In neither House has there developed a single committee or authority, similar to the British cabinet, with full power and

[1] See Wilson, *Constitutional Government in the United States*, chap. v.

responsibility for the conduct of public business. Every important piece of legislation is handled by the chairman in charge. He conducts the negotiations within his party and outside. Everybody interested joins in the enterprise. If serious troubles arise, a caucus may be called, but ordinarily the affair will be managed by the art of negotiation. Power, system, and responsibility are no part of the congressional plan.

The Committees of Congress

IV. As a part of the system by which the two houses endeavor to deal with the enormous mass of business coming before them, there has been evolved an extensive scheme of standing committees.[1] The student of our national government should therefore bear in mind the fact that the legislative work of each house is done largely by committees and that every committee of each house is controlled by a majority of members representing the dominant party.

From the beginning of our history there has been an almost steady increase in the number of committees, and at the present time there are about seventy in the Senate and sixty in the House. With the increase of business, it becomes necessary from time to time to relieve old committees by assigning a part of their work to new committees. Each committee has a well-furnished office and many "perquisites" which are not to be despised by members of Congress. Finally, the natural pride of each member leads him to want some important committee assignments, and to satisfy the demand for assignments, new places must be created.

The committees vary greatly in importance. In the lower house, the leading committees are on ways and means, appropriations, rules, banking and currency, interstate and foreign commerce, rivers and harbors, military affairs, naval affairs, post-office and post roads, public lands, labor, and pensions. In the Senate, the committees on appropriations, finance, commerce, foreign relations, judiciary, military affairs, naval affairs, interstate commerce, and pensions take high rank.

Formerly all standing committees of the House of Repre-

[1] Select committees are appointed from time to time to deal with specific matters. When a select committee reports, it is dissolved unless given further power. Only a few of the regular committees have any importance.

sentatives were appointed by the Speaker, but this system was changed in 1910–1911 in favor of an election by the House itself. The difference in practice made by this change in the rules is more apparent than real. Since the beginning of the party system in the United States, the selection of the members of committees has been in the hands of the caucus of each party, under the leadership, and perhaps dominance, of a few men experienced in the arts of management. To borrow a term from economics, we may say that the committee assignments in the House and in the Senate are determined by a "higgling in the market" and that the various posts fall to members roughly according to seniority, their abilities, their power as leaders, their skill in management. This "higgling" begins long before a new Congress meets; most of the important assignments are determined probably before the party caucuses assemble, and the caucuses only ratify the work of the pre-caucuses while the houses ratify the work of the caucuses. The minority party chooses representatives on each committee, somewhat in the same manner, but they seldom count for much in the determination of policies.

Formerly it was the custom of party leaders in both houses to assign all of the important chairmanships to members who had seen long service, and it was only natural that the direction of affairs should fall to the most experienced. However, with the Democratic victories in 1910 and 1912, a great outcry was made by the incoming new members against allowing the old Democratic Senators and Representatives to monopolize the committee assignments on principles of seniority.

It is in the committee room usually behind closed doors and secure from public scrutiny that the real legislative work is done.[1] Every bill, important or unimportant, is sent to the committee having jurisdiction over the subject-matter to which it relates.[2]

[1] Only bills which are reported favorably from committees have much chance of being acted upon, and when a bill is once favorably reported by a committee, its chances of passage are very high. For example, in the Fifty-eighth Congress, 19,209 bills were introduced in the House; the committees reported 4904; and 4041 were passed. Hinds, *Precedents*, Vol. V, p. 286.

[2] Bills of a private nature are referred by the clerk of the House to the committees indicated by the introducers. Public bills are referred by the Speaker, but his reference may be changed by the House.

The recommendations contained in the President's message are likewise so distributed. Quite frequently the committees originate the bills — especially appropriation bills — relating to the matters placed under their jurisdiction.

Thousands of bills which go to committees are not considered at all, but a measure which a committee reports receives an analysis and criticism more or less severe, according to the character of the bill. On a measure of vital importance, papers and documents relating to the subject may be secured from the head of the executive department to whose duties it relates; or the officer himself may be requested to appear personally and answer a multitude of questions propounded by the committee members. Friends and opponents of the measures pending in committees are frequently admitted to state the reasons for their positions; hearings may even be held in various points throughout the country, and witnesses may be required to attend the committee meetings and give evidence very much in the same manner as in a courtroom.

In almost every case the measures in charge of a particular committee are considered or formulated by a sub-committee (in which the minority receives scant recognition), and the whole committee generally accepts its report. On purely party questions, such as the tariff, the majority members of the committee draft the bill, and, when the measure is complete, they may invite the minority members in to vote on it as a matter of form. With regard to any measure referred to it, a committee may recommend its adoption, amend it, report adversely, delay the report indefinitely, or ignore it altogether. In the House it rarely happens that a member is able to secure the consideration of a bill which the committee in charge opposes; but in the Senate a greater freedom is enjoyed in this respect.

Owing to the pressure of business in the House, it is impossible to consider each bill on its merits and arrive at a vote after searching debate and mature deliberation; and it has often happened that very important measures have been forced through as they have come from committee without any serious debate or a single amendment.[1] This, of course, places an enormous power in the

[1] Many speeches which appear in the *Congressional Record* are not delivered in the House at all, but are prepared by members for the benefit of their constituents.

hands of committees and changes the House from a deliberative into a ratifying assembly. There has been a great deal of criticism of the committee system, but no acceptable substitute has as yet been suggested. As early as 1880, the Independent National, or Greenback, party demanded absolute democratic rules for the government of Congress, placing all representatives of the people upon an equal footing, and taking away from committees "a veto power greater than that of the President." Complaints are constantly being made in the House itself, especially by members of the minority. "You send important questions to a committee," said Mr. Sherley, in the House in 1905; "you put into the hands of a few men the power to bring in bills, and then they are brought in with an ironclad rule, and rammed down the throats of members; and then those measures are sent out as being the deliberate judgment of the Congress of the United States when no deliberate judgment has been expressed by any man." [1]

This division of each house of Congress into a large number of separate committees, no doubt, does lead to many deplorable results. These committees work with little or no reference to one another, each preparing its own bills with slight regard to the measures in the other committees. The committee on ways and means has no official communication with the committees in charge of appropriations, for example. That is, the committee on raising revenues has no way of balancing its accounts over against the estimated expenditures as they are shaped by the several committees on appropriation measures. The result of this practice is not only unfortunate as far as revenues and expenditures are concerned; it often leads to ill-adjusted and conflicting legislation even on matters of fundamental importance — matters which in England would receive the careful attention of the Cabinet, composed of the leaders of the majority party.

There are serious constitutional difficulties in the way of our creating such a system of Cabinet responsibility for legislation, but possibly, while retaining the committee system now in force, we may secure more responsibility by frankly recognizing the power in the hands of the chairmen of important committees, and by holding them definitely accountable as party leaders. There is however no device, except public opinion, for enforcing the responsibility so recognized.

[1] *Congressional Record*, Vol. XL, part 1, p. 455; 59th Cong., 1st Sess.

Leadership in the House of Representatives

V. In this tendency to develop some sort of responsibility for legislative policies at Washington, the power of the Speaker of the House of Representatives assumes an important place.

In every large body with a great amount of business to transact there must be some directing authority to see that the necessary measures are disposed of promptly, and to prevent procedure from falling into chaos. In England, this leadership is avowedly vested in the Prime Minister, who is the acknowledged head of the majority party in the House of Commons, and is chiefly responsible for the successful realization of the party policy in Parliament. The Speaker of the House of Commons under these circumstances does not feel any responsibility in this matter, and accordingly maintains an attitude of impartiality in his rulings and decisions — at least in theory. In the beginning of our federal government, the Speaker was regarded as a mere moderator, but as the House grew in size and the business to be transacted increased enormously, it became impossible for him to sit passively and see the measures of his party delayed or defeated by the dilatory tactics of the minority.

Hence it came about that the Speakership of the House under the direction of powerful men like Thomas B. Reed and Joseph Cannon tended to develop into an office akin to that of the prime minister. During the closing years of the nineteenth century and the opening years of the twentieth century the Speaker became a sort of a premier in a small unofficial cabinet composed of his two party colleagues on the rules committee (the minority party's two members counting for nothing) and the chairman of the more powerful committees of the House. "The Speaker's control over legislation is now, under the rules and practices of the House, almost absolute," said an editorial writer in 1897. "The people know this now. The time has passed when the Speaker could exercise his vast power unsuspected. Nor can he shirk his responsibility. No bill can pass the House without his passive approval, and that in effect is the same thing as active advocacy."

The Speaker, according to constitutional law, is chosen by the House of Representatives, but in fact he is elected at a caucus of the majority party, and the House merely ratifies the selection.

The office always falls to some member of long service who has had not only an opportunity to master the intricate details of parliamentary procedure, but also has learned the fine art of political manipulation — of securing support, skilfully distributing favors, and thwarting opposition. He is a man who has shown capacity for "getting things done" on the floor of the House and in the committee room. He does not rise to the position through his power as an orator or his ability to command the approval of the country in the same way that an English member of Parliament rises to the position of Prime Minister. Nevertheless, he is in a very real sense a party leader.

The elements of control in the hands of the Speaker are undoubtedly powerful, although the right to appoint committees has been taken from him. He may refuse to put dilatory motions; he may recognize whomsoever he pleases on the floor of the House; and he decides questions of parliamentary procedure, subject to appeals from his decisions.[1]

Inasmuch as the ordinary member of the House [2] can bring his own measures up for discussion only with the "unanimous consent of the House," the Speaker enjoys a considerable power in this connection. As a member himself, he has a right to "object," and thus prevent the Representative asking the attention of the House from getting a hearing on his particular schemes. For a long time it was customary for the Speaker, when he did not want any matter brought up under the rule of "unanimous consent," to notify some supporter on the floor to object, but Speaker Cannon, to use his own words, "thought the better way and the more manly and fairer way was to exercise his right as a member, to object to a request for unanimous consent." [3] Under Mr. Cannon's régime, any member, therefore, who wished to call up a measure in the House was forced to visit the Speaker in advance and secure his approval, and in giving his consent the Speaker was not unmindful of the service he had secured or might secure from the man soliciting his favor. Every member has several schemes of his own relating to his district and demanded by his constituents.[4] He must get a

[1] *Readings* (1st ed.), p. 260.

[2] The most important committee chairmen, of course, occupy a privileged position. See above, p. 274.

[3] Reinsch, *Readings*, p. 234.

[4] See above, p. 270.

hearing, or be a nonentity in the House; his political career depends upon it. There is no use trying to explain to his fellow-citizens the rules of the House which prevented his being heard. Speaker Cannon, therefore, held the key to the situation.

The way in which this practice sometimes worked hardships for individual members is illustrated in this account by Mr. Cooper, a member from Wisconsin: —

> We all know that we cannot get a bill passed — every man on the floor does, Republican or Democrat — by unanimous consent unless the Member presenting it first goes to the private chamber of the Speaker and asks to be recognized. The Speaker does not have to give his reasons for any objections he may have. He does not rise upon the floor, but in his private chamber he objects. I wish to say that the present Speaker of the House has always treated me with the utmost courtesy and kindness. A former Speaker of this House compelled me to go to his room at one time. I went there to present a bill which provided simply for the changing of the material which was to go into a public building and which had been recommended to him in a letter from the office of the Supervising Architect. . . . I went to the Speaker's chamber. I had refused on a former occasion to do his bidding. When I went to his room he said, "I will see about that; come in again." I went in again. He did not ask me to sit down. He said, "I do not think I can do that; I do not want to do that; I cannot allow that to come up." Not only that, but he compelled me to stand there, and when a perfect stranger came in, he sat him down in his seat and turned his back on me. A very important rule had previously come before the House of Representatives. That same Speaker had stopped me at the entrance there and put his hand upon my breast and said, "Mr. Cooper, you will oblige me very much by not opposing this rule." That rule related to the Pacific Railroad funding bill. I did oppose it. I was the only Republican of the minority of the committee that reported against the bill; the rule was modified, and for the first time in thirty years the Pacific Railroad people lost their bill. That same Speaker refused practically to recognize me for four or five years for any purpose, and never when he could help it.[1]

Nevertheless, many bad measures were checked by this exercise of power. Members of the House do not have the time to consider the measures on which their unanimous consent is asked, and, besides, they have plans of their own, so that they cannot use discretion in objecting. The main burden of responsibility was

[1] Reinsch, *Readings*, p. 228

thus placed upon the Speaker, and consequently he openly assumed it.

Until March 19, 1910, a considerable portion of the Speaker's power came from his connection with the committee on rules — a committee consisting of himself, and two majority and two minority members named by himself.

This important committee on rules may at any time recommend the adoption of any methods of procedure in connection with a particular bill which will secure its speedy passage. A report of this committee is highly privileged; it may be brought in at any time; only a motion to adjourn may be entertained during its consideration; and the Speaker will not allow any dilatory motions until it is fully disposed of. "The essence of the power of the committee on rules," says Professor Reinsch, "lies in the fact that it has the right to report at any time a resolution that a bill or other measure be made a special order for a certain day. As nearly all the important measures before the House of Representatives are dealt with under special orders, the committee on rules has, therefore, in its hands practically the complete control of the course of business in the House. It determines what measures shall be discussed, how much time is to be given to them, and in what order they are to be brought up."[1] It may, for example, recommend to the House a resolution which will have the effect of stopping debate on a particular measure, and force its adoption or rejection in the form in which it came before the House.[2] The resolutions introduced by this committee, however, are subject to the approval of the House, so that whenever one of its drastic recommendations is adopted, it is only because it has correctly measured the temper of the majority — disciplined under party leadership.

The way in which the committee formerly operated may be illustrated by the following extract from the *Congressional Record* (1908): —

MR. DALZELL. Mr. Speaker, I submit the following privileged report from the Committee on Rules.

[1] Reinsch, *American Legislatures and Legislative Methods*, pp. 45 ff. Professor Reinsch's statement, however, should be modified somewhat, for many more important measures than his words imply are taken up without special orders from the rules committee.

[2] For a "special order" from the rules committee, see below, p. 284.

THE SPEAKER. The gentleman from Pennsylvania submits a report from the Committee on Rules, which the Clerk will report.

The Clerk read as follows: —

Resolved, That immediately upon the adoption of this rule and at any time thereafter during the remainder of this session, it shall be in order to take from the Speaker's table any general appropriation bill returned with Senate amendments, and such amendments having been read, the question shall be at once taken, without debate or intervening motion, of the following question: "Will the House disagree to said amendments *en bloc* and ask a conference with the Senate?" And if this motion shall be decided in the affirmative, the Speaker shall at once appoint the conferees, without the intervention of any motion. If the House shall decide said motion in the negative the effect of said vote shall be to agree to the said amendments. And further, for the remainder of this session the motion to take a recess shall be a privileged motion, taking precedence of the motion to adjourn, and shall be decided without debate or amendment. And further, during the remainder of this session, it shall be in order to close debate by motion in the House before going into Committee of the Whole, which motion shall not be subject to either amendment or debate. (Applause on the Republican side.)

MR. SULZER. Mr. Speaker, would it not be well to add to that "That hereafter the Democrats shall have nothing more to say"? (Laughter.)

MR. DALZELL. Mr. Speaker, the purpose of this rule, like the purpose of the rule that was introduced yesterday, is to expedite the public business.

MR. WILLIAMS. Mr. Speaker —

THE SPEAKER. Does the gentleman from Pennsylvania yield to the gentleman from Mississippi?

MR. DALZELL. Yes.

MR. WILLIAMS. I wish to ask the gentleman a question. I wish to ask, before we proceed, whether the minority members of the Committee on Rules will be accorded the usual twenty minutes?

MR. DALZELL. They will not.

MR. WILLIAMS. They will not! I just wanted the House and the country to know that fact before we start this debate.[1]

Through the aid of this machinery, a perfect system of control over all business of the House was built up by Republican leaders during the long tenure of that party from 1897 to 1911. The Speaker, Mr. Cannon,[2] appointed all of the committees and named the chairman of each; in conjunction with the rules committee and the chairmen of a few powerful committees he

[1] Reinsch, *Readings*, pp. 273 f. [2] From 1903 to 1911.

completely dominated the procedure of the House. The system enabled the Speaker and his few experienced colleagues to bring the new member of Congress into line with "the old guard" by closing to him all avenues to power and preferment unless he capitulated or kept silence. It permitted the Speaker and his immediate supporters, even though constituting a minority of the entire House, to check any spirit of independence and criticism shown by their party associates. The system virtually established minority rule in the House, because the men who would have been independent if they could, taken in conjunction with the members of the opposition party, frequently constituted a majority of the whole number of Representatives.

Against this system the Democrats protested as a matter of course, for it destroyed their influence in the House; but their objections would have had little avail, if there had not been discontent among the newer Republican members, and particularly among the more radical Representatives from the West, who disliked the policy of the leaders of Congress on the tariff in 1909 and could not get the hearing for their own plans which they thought they deserved. Moreover, Mr. Cannon was often needlessly harsh in his rulings and made many personal enemies. At length in March, 1910, the Democrats, aided by these "insurgent" Republicans, were able to carry a resolution to the effect that the rules committee should consist of ten members instead of five, that the said committee should be elected by the House instead of appointed by the Speaker, and that the Speaker himself should no longer be a member of the committee. When the Democrats, victorious in the election of 1910, took possession of the House in 1911, they provided that all committees should be elected by the House. When Mr. Wilson became President in 1913 the leadership in formulating legislative policies passed from the Capitol to the White House.

The change in the machinery for selecting committees was no doubt more nominal than real, because the selection was still made in caucuses as before.[1] The prestige of the Speaker was, however, somewhat reduced, and more power was thus transferred to other party leaders, particularly the chairman of the ways and means committee. More weight was also given, perhaps, to the opinions of the rank and file expressed in the caucus.

[1] Above, p. 277.

Leadership there still is in the House, and leadership there must be in order to give direction to affairs and to dispose of the immense mass of business constantly pressing upon that body. But we may say that, for the present, the leadership is vested in the chairman of the ways and means committee aided by the Speaker and the chairmen of certain of the other more important committees. And we may say also that we now have from the representatives of the minority party the same complaints against "tyranny" and "dictation" which were heard in the older days when Speaker Cannon and his few colleagues directed the course of procedure.

The Transaction of Legislative Business in the House

VI. With this preliminary survey of some of the institutions and practices of Congress, we are better able to understand the procedure of this body from day to day. The principles governing this procedure are to be sought in Jefferson's *Manual of Parliamentary Practice*, the standing rules of each house, and the vast number of precedents established during the history of Congress. Whoever finds sheer enjoyment in unravelling complicated problems of procedure has an unlimited field for self-indulgence in the eight bulky volumes of a thousand pages each, compiled by Mr. A. C. Hinds, Clerk of the Speaker's Table, bearing the title of *Parliamentary Precedents of the House of Representatives*.[1] Fortunately, however, the principles, or rather lack of principles, governing the conduct of business in either house may be understood by the mastery of a few fundamental practices.[2]

At the opening of a new Congress the House of Representatives is called to order by the clerk of the last House, who calls the roll, and, finding a quorum present, announces that they are ready for nominations for Speaker. The majority and minority put forward their candidates, and after the former's nominee is duly ratified, he takes the oath of office administered by the member longest in continuous service of the House. The roll is called by the clerk, and the Representatives go forward to be sworn in. The other officers are chosen, and the President of the

[1] Copies of the rules of both houses may be secured by writing to a Senator or Representative.

[2] On Senate procedure, see above, p. 275.

United States and the Senate are informed that the House is ready for business. The question of the adoption of the rules of the preceding Congress is then threshed out, and usually carried in the face of the traditional protests of the minority. In due time the names of the committeemen selected by the caucuses of the parties are read, and approved by the House.

The Senate differs from the House in being a continuous body. At each new Congress only one-third of the members are renewed. The presiding officer, the Vice-President, as required by the Constitution, takes the chair. In case of his absence, his duties are performed by a president *pro tempore*. The newly elected Senators are called in alphabetical order by the secretary of the Senate, and each Senator in turn is escorted to the presiding officer's desk, usually by the colleague from his state, and there takes the oath of office. The President and House are duly notified, and then the Senate is also ready for work.

Bills are introduced in the House in several ways. Any member may introduce any measure he likes by drafting it and depositing it on the clerk's table, or he may introduce a petition for a bill which will be referred to an appropriate committee for drafting. All really important bills, however, such as tariff bills, currency measures, and the like are drafted by the majority members of the committee in charge of the subject-matter. Sometimes, the committee of the House coöperates with the committee of the Senate having charge of similar business, in preparing a bill. If the matter is very important and the President of the United States is interested, he may join with some of the committee members in preparing the bill; and prominent party leaders not in office may be consulted. A caucus of party members may be held on the bill even before it is introduced.

On their introduction, all public bills are referred by the Speaker to the appropriate committee which may hold hearings and give the matter any amount of attention it sees fit. The committee may report the bill to the House favorably unamended, or it may amend it and report it in such form, or it may report unfavorably, or it may neglect it altogether.[1]

The important committees,[2] which may report at any time, report from the floor, and other committees report by laying their reports on the clerk's table.

[1] Above, p. 278 [2] Above, p. 276.

Unless it is a highly privileged matter, a bill, when reported, is placed on a calendar for debate according to the rules.

All public bills raising revenue or authorizing the appropriation of money or property are considered in the committee of the whole House. In this form, one hundred constitute a quorum and the Speaker resigns the chair to some other member. The stages in this committee are "general debate, reading for amendment under the five-minute rule; order to lay aside with a favorable recommendation, or to rise and report; reporting of to the House."

Bills not required to be considered in the committee of the whole House are read a second time when they are reached on the calendar and are then open to discussion and amendment in the House.

The third reading usually takes place by title and the question is put by the Speaker as a matter of course.

The Constitutional Rights of the Minority in the House

After this survey of the methods by which the majority in the House of Representatives may control the introduction of bills, reports of committees, and the discussion and passage of measures, it might be presumed that the minority party is without power to influence in any effective manner the course of legislative procedure. This view, however, is not strictly correct. By exercising certain constitutional privileges, the minority may block proceedings and go a long way toward forcing the majority to adopt certain policies. The Constitution provides that on the request of one-fifth of the members present, the roll of the House must be called on any question, and the yeas and nays of the members entered upon the journal. The Constitution furthermore provides that no business shall be done unless a quorum is present, and the minority, in the House or Senate, may therefore frequently raise the question of the presence of a quorum. Finally, as we have seen, a great deal of the legislative business is done under the rule of unanimous consent, which, of course, may be steadily refused by the minority members.

More than once the leader of the minority party has thrown down the gage to the majority leaders and frankly informed them that unless certain policies were adopted the minority would

exercise all of its privileges under the rules for the purpose of obstructing business. A notable example of a minority threat occurred in March, 1908, when Mr. John Sharp Williams, the Democratic leader, announced that his group would refuse unanimous consent to all legislation and would call for the yeas and nays upon every affirmative proposition until the majority would agree to report on certain bills — measures providing for employers' liability, publicity of campaign contributions, free wood pulp and free print paper, and regulating the granting of injunctions.[1]

The Final Stages of a Measure

When a bill has passed either house, it is transmitted to the other body for consideration. For example, when the Senate has passed a bill, it thereupon despatches it to the House by the secretary, who, on his announcement by the doorkeeper and recognition by the Speaker, addresses that assembly in the following language: "I am directed by the Senate to inform the House that it has passed the Senate bill No. 125 [giving the title], and that a concurrence of the House therein is respectfully requested." If the House passes the bill thus brought in, the Senate is notified; the measure is then signed by the President of the Senate and the Speaker of the House, and is sent to the President of the United States for his signature. If he approves the bill, he notifies the House in which it originated of his action, and sends it to the Secretary of State for official publication. If he vetoes the measure, he returns the bill to the house in which it originated, with a statement of the reasons for his action, unless that body has adjourned. If a bill originates in the House, it is sent to the Senate and goes through a similar process.[2]

[1] Reinsch, *Readings*, p. 272.

[2] Although the provisions of the Constitution are explicit to the effect that every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President, Congress has devised a measure known as the "concurrent resolution," which, although it clearly has the effect of law, is not submitted to the President for approval. The form of this resolution is as follows: *Resolved*, by the House of Representatives (the Senate concurring) that, etc.; or, *Resolved*, by the Senate (the House of Representatives concurring) that, etc. From the beginning of the government it has been the uniform practice of Congress not to present concurrent resolutions to the President and to avoid incorporating in such resolutions any matter in the nature of legislation. The concurrent resolution is fre-

Whenever a bill originating in one house is amended in the other, it must be returned to the first for reconsideration, and for adoption or rejection as amended. If, at last, the houses are unable to agree upon a measure, — a regular occurrence in the case of important bills, — it is the practice for the presiding officer of each body to appoint representatives to a conference committee as it called, authorized to discuss the differences, to come to some agreement upon the disputed points, and report back to the respective houses their agreement, or their inability to come to terms. As a general principle the conference committee, in coming to an agreement, should introduce no new matter into the measure which it has under consideration — that is, no provision that has not been already adopted by either the Senate or the House. It is, of course, not easy to determine whether new matter has been introduced into a long and complicated measure. Certainly the conferees are not limited in their action to the adoption of the provisions as actually passed by one house or the other. They may, and often do, draft a compromise proposition, perhaps midway between the extremes demanded by the two houses, and in drafting this compromise proposition they may, of course, change the language of the bill. When a conference committee report is submitted, each house adopts it, or rejects it as a whole; it does not amend.

Securing Information for Legislative Action

In the exercise of its legislative functions, Congress frequently makes use of some special committee of investigation. For example, it instituted by an act of June 18, 1898, an industrial commission consisting of five members of the House of Representatives, five Senators, and nine persons appointed by the President — the last to be paid salaries. This commission was instructed to investigate questions appertaining to immigration, labor, agriculture, and business, and report to Congress and suggest desirable legislation upon these subjects. This commission made a long and exhaustive investigation and reported to Congress a voluminous mass of testimony and many proposals for

quently used in ordering the publication of documents, in paying therefor, and in incurring and paying other expenses, the moneys for which have been appropriated and set apart by law for the use of the two houses.

legislative action. More recently, in February, 1907, Congress created a joint commission on immigration, consisting of three Senators, three members of the House of Representatives, and three persons (appointed by the President) — charged with the duty of making a full investigation into the subject of immigration. A large sum of money was placed at the disposal of this commission. In 1913 Congress established an Industrial Relations Commission, which conducted an elaborate inquiry into labor and agricultural problems and startled the whole country by the radical character of its findings.

Sometimes, in conducting investigations, Congress, by a joint resolution, authorizes executive officers of the government to conduct inquiries and report on specific matters subject to legislation. For example, on February 12, 1906, by joint resolution, Congress instructed the Interstate Commerce Commission to make examinations into the subject of railroad discriminations and monopolies, and to report on the same from time to time. Furthermore, Congress has required certain federal courts to compel witnesses to testify before the Interstate Commerce Commission, and the Supreme Court has held this law constitutional. The Court declared that it was clearly competent for Congress to invest the Commission with an authority to require the attendance and testimony of witnesses and the production of books, papers, and documents relating to any matter legally committed to that body for investigation. In considering, however, the question as to whether the Commission itself could be authorized to compel obedience to its orders by a judgment of fine or imprisonment, the Court said: "Except in the particular instances enumerated in the Constitution . . . the power to impose fine or punishment in order to compel the performance of a legal duty imposed by the United States, can only be exercised under the law of the land by a competent judicial tribunal having jurisdiction in the premises." [1]

Whatever may be the theory as to the power of Congress to investigate the working of executive departments,[2] there is as a matter of fact a long line of precedents showing that both houses from time to time assume the right of investigating the conduct of executive business. For example, in 1818, the House of Representatives appointed a committee to inquire whether any

[1] Hinds, *Precedents*, Vol. IV, pp. 114 ff. [2] See above, p. 209.

clerks or other officers in any of the departments or in any office at the seat of the general government had conducted themselves improperly in their official duties, and authorized the committee to send for persons and papers. When it was contended that this resolution assumed a power over executive departments that belonged to the President alone, and would thus impair executive responsibility, it was answered that the House was like a grand jury to the nation and that it was its duty to inquire into the conduct of public officers. A year later the House asserted that, having the constitutional right to concur in the appropriation of public moneys, it also had the right to examine into the application of appropriations for the purpose of discovering whether they had gone into the proper channels. From that day to this, it has been a frequent practice for both houses to make investigations into the various branches of the public service.

Notwithstanding these and other precedents, it is still an open question how far Congress or either house may go in compelling the executive branches of the government to yield any information demanded. For example, in 1909, the Senate, by a resolution, directed the Attorney-General to inform that body whether he had instituted proceedings against the United States Steel Trust for absorbing the Tennessee Coal and Iron Company in violation of the Sherman anti-trust law, and if not, why not; and whether he had rendered an opinion as to the legality of the said absorption. President Roosevelt directed the Attorney-General not to respond to the demand for the reasons for his non-action in the case. The President further declared that "heads of departments are subject to the Constitution and laws passed by the Congress in pursuance of the Constitution, and to the direction of the President of the United States and to no other direction whatever."

The chief sources of information for legislative action are, of course, the hearings and investigations conducted by the standing committees of Congress to which the bills introduced into Congress are referred for study and action. Each of the important standing committees has a commodious and well-equipped room in one of the magnificent office buildings constructed for the Senate and House. Every leading committee has a library of materials bearing on the subjects

referred to it and also has at its command the extensive resources of the Congressional Library. Committees may also call upon the Legislative Drafting Service, of which there are two branches, one for the Senate and another for the House. The Library of Congress maintains a division of Legislative Reference charged with the duty of furnishing information on questions pending before the houses.

In conducting investigations, the committee may hold its sessions in secret and admit only those persons invited or required to attend; or the committee may hold open sessions and admit the general public to hear the presentation of arguments and evidence. Always before the enactment of a new tariff, the ways and means committee holds open sessions and allots time generously to private parties and representatives of manufacturing interests who may have something to say on the desirability of changing the tariff schedules. How far these inquiries actually throw light on the problems before Congress depends largely upon the skill with which the hearings are conducted and the actual interest of the committee members in obtaining results.

Finally, the student may naturally inquire whether debates in Congress do not afford information on legislative questions. In the Senate, it frequently happens that speeches, particularly on constitutional law, really illuminate problems before that body; but it cannot be said that the House derives much information from the desultory and partisan speeches delivered there. Mr. Bryce attributes this absence of informing debates to the committee system itself.

In fact, the average member of the House is absorbed in his own affairs and the work of the committees to which he is assigned. He is, therefore, not strongly inclined, as a rule, to question the wisdom of the results reported by other committees. He assumes that the members of the other committees know more about their business than he does, and furthermore he does not like to stir up trouble for himself by criticisms of their work.[1]

[1] For observations on the character of congressional legislation and comparisons with the British system, see Bryce, *American Commonwealth*, Vol. I, pp. 167–75; 278–97.

CHAPTER XV

THE FEDERAL JUDICIARY

THE Constitution of the United States makes only slight reference to the structure of the federal courts.[1] It merely provides that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. It is thus within the power of Congress to determine the number of Judges in the Supreme Court and to create any additional tribunals which may be deemed necessary for the transaction of federal business. It is true, the Constitution seeks to secure a certain degree of independence for the judiciary, by prescribing that the Judges of both the Supreme and inferior courts shall hold office during good behavior and receive for their services a compensation not to be diminished during their continuance in office; but in reality the federal courts are largely creations of the legislature.[2]

While Congress may not remove the judges of an inferior court, except by the process of impeachment, it may get rid of them by abolishing the court altogether. This was actually done in 1802, during Jefferson's administration, when the Republican Congress repealed the law of the preceding year creating sixteen circuit judgeships which President Adams had filled with Federalists on the last night of his term, and again in 1913 when Congress abolished the Commerce Court created in 1909. Of course, Congress cannot abolish the Supreme Court, remove any of its Judges except by impeachment, or reduce their salaries during their respective terms of service, but it may [3] by political methods "pack" the Supreme Court very much as the House of Lords of England can be packed if it should refuse to adopt a measure passed by the Commons. It may, if it chooses, re-

[1] *Readings*, p. 273.

[2] Burgess, *Political Science and Constitutional Law*, Vol. II, p. 321.

[3] In collusion with the appointing power — the President and Senate.

duce the number of Judges by providing that, on the death or resignation or removal of any Judge, the particular judgeship shall be abolished.[1] Again, it may increase the number of Judges in order to secure the appointment of men known to entertain certain views as to the constitutionality of any particular measures. Congress may furthermore influence, in a way, the judicial department by refusing to provide the requisite number of inferior courts or adequate processes. However, the judiciary, save in two or three instances, has not been controlled by any of these methods, and it therefore enjoys, for practical purposes, a high degree of independence from legislative interference.

The framers of the Constitution evidently contemplated an independent judicial system and, while the constitutional provision with regard to the judiciary is not self-executive, an imperative mandate is certainly laid upon Congress to organize the Supreme Court and to create inferior courts. As Senator Spooner has put it, it would be revolutionary for Congress to omit the organization of the Supreme Court and the establishment of inferior courts.[2] Indeed, Senator Stone has gone so far as to say that the inferior courts are established as a public necessity and in pursuance of a public policy outlined in the Constitution, and cannot be arbitrarily abolished. "Congress has power to create," he declared, "but has no power to destroy. Congress cannot destroy the judiciary any more than the judiciary can destroy Congress. . . . If to-day Congress should pass an act abolishing all the circuit and district courts of the United States without substituting other tribunals in their stead, can there be any doubt that the Supreme Court would declare the act to be unconstitutional and void?"[3] It is difficult to see, however, what the Court could accomplish by declaring such a law void.

The Federal Courts

All federal Judges are nominated by the President and appointed by and with the advice and consent of the Senate. With regard to the inferior courts, this mode of appointment is

[1] This was actually done in 1866 to prevent President Johnson from filling vacancies.

[2] *Congressional Record*, Vol. XL, part 5, pp. 4115–4117.

[3] *Ibid.*, Vol. XL, part 5, p. 4772.

a matter of practice rather than of constitutional law. The Constitution provides that the President and Senate are to appoint the Judges of the Supreme Court; but authorizes Congress to vest the appointment of such "inferior officers" as it thinks proper in the President alone, in the courts of law, or in the heads of departments. By uniform practice, however, it is settled that the judges of the inferior federal courts are not "inferior officers" whose appointment may be taken from the President and Senate and vested in some other authority. The Judges of the Supreme and inferior courts hold office during good behavior, and therefore cannot be removed except by impeachment.

Under these constitutional provisions Congress has created the following scheme of courts: —

1. At the head of the system stands the Supreme Court composed of nine Judges.[1] This Court holds its sessions usually from October until May in the chamber of the Capitol formerly occupied by the United States Senate. The most important business that comes before it involves questions of constitutional law brought up from lower federal courts or from state courts on appeal or by writ of error.[2]

The cases are presented to the Judges in the arguments of attorneys or in printed briefs or by both methods. A case as presented contains a statement of the facts involved in the controversy and the arguments of the attorneys on the law and facts. When a case is submitted, it is the duty of each Justice to examine the facts and the arguments and to apply the law. After each Judge has looked at the case independently, a conference is held at which the various points are discussed at length and a decision reached. Thereupon, the Chief Justice requests one of his colleagues[3] to prepare what is called "the opinion of the court," which contains the conclusions reached by the majority

[1] A Chief Justice and eight Associate Justices. Six Judges must be present at each trial and a majority is necessary for a decision. The salary of the Chief Justice is $15,000 and of the Associate Justice $14,500.

[2] It is not very often that the Supreme Court is called upon to try an original case affecting ambassadors, public ministers, and consuls, but there have been several cases of disputes between states over boundaries and other matters which have been brought before that tribunal as a court of first instance.

[3] Of course he may write the "opinion" himself.

and the final order in the disposition of the case. This "opinion" is subjected to the scrutiny of the Judges and after a careful revision, which then represents the solemn and final conclusion of the Court, it is printed and placed on record. Any Judge, who agrees with the judgment of the majority, but bases his conclusion on other arguments than those put forward in the opinion, may prepare what is called a "concurring opinion," in which he sets forth his own reasons for reaching the same end. In some instances, therefore, a majority of the Court may agree that a particular case shall be decided in favor of the plaintiff (or defendant), but each Justice may assign different reasons for his own action.

It is also the practice, in all important cases, for the minority of the Judges who disagree with the conclusion reached by the majority to prepare a "dissenting opinion," setting forth their reasons for believing that the case should have been decided otherwise. Sometimes each of the dissenting Judges prepares his own opinion; sometimes one of them writes an opinion which is concurred in by his dissenting colleagues. As a matter of fact, many crucial cases involving constitutional law have been decided by a narrow majority — within recent years, five to four. The opinions thus rendered are officially published as the *United States Reports*, and at the present time the opinions for a single term of the Court extend to three or four volumes. They form the great authoritative source of information on the historical development and present status of constitutional law.

2. Immediately under the Supreme Court is a Circuit Court of Appeals in each of the nine great circuits into which the United States is divided.[1] The act of 1891, which established this Court for the purpose of relieving the Supreme Court somewhat from the pressure of business, did not create a new set of judges for

[1] The first circuit embraces Maine, Massachusetts, New Hampshire, and Rhode Island; the second, Connecticut, New York, and Vermont; the third, Delaware, New Jersey, and Pennsylvania; the fourth, Maryland, North Carolina, South Carolina, Virginia, and West Virginia; the fifth, Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas; the sixth, Kentucky, Michigan, Ohio, and Tennessee; the seventh, Illinois, Indiana, and Wisconsin; the eighth, Arkansas, Colorado, Oklahoma, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, South Dakota, Utah, and Wyoming; the ninth, Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, and Hawaii.

each Court of Appeals, but employed judges from the lower federal courts to do the appeal work.[1] However, by the great reorganizing statute of March 3, 1911, provision was made for separate judges for the Circuit Courts of Appeals, known still as Circuit Judges. In those circuits which have a large amount of business there are four judges, in the smaller circuits two judges, and in the remainder three judges, appointed by the President and Senate. Each of the Justices of the Supreme Court is allotted to one of the nine circuits.

The Circuit Court of Appeals has the right to review, by appeal or on writ of error, decisions in the lower District Courts, and its decision is final in a large number of cases, such as controversies between aliens and citizens, suits between citizens of different states, and cases arising under patent, revenue, and criminal laws. However, the Circuit Court of Appeals may ask the Supreme Court for instructions on any point of law; and the Supreme Court may call the case up and decide it, or may inquire by writ of certiorari into final causes pending in the Circuit Court of Appeals. Appealed cases from the lower federal courts within a circuit go to the Circuit Court of Appeals, unless they involve the jurisdiction of the lower court, final sentences and decrees in prize cases, or the Constitution, or the constitutionality of laws, or treaties of the United States, or the constitutionality of an act of any state — in which instances appeals may be taken directly from the lower courts to the Supreme Court of the United States. This reserves, therefore, to the Supreme Court the decision of cases involving constitutionality, and gives to the Circuit Court of Appeals the final decision in nearly all other cases involving merely the application of ordinary law. As a matter of fact, however, it is relatively easy to raise the question of constitutionality, so that this new Court has not been able to render the expected services in relieving the great tribunal at Washington.

3. The lowest federal Court is the District Court. Formerly

[1] The law still provides, "In case the full court [of appeals] at any time shall not be made up by the attendance of the Chief Justice or Associate Justice of the Supreme Court of the United States and circuit judges, one or more district judges shall be competent to sit in the court . . . as shall be designated by the court." At least one term must be held annually at a place designated by law, and other terms are held at times and places designated by the order of the court.

there was a Circuit Court between the Circuit Court of Appeals and the District Court, but that court was abolished by the law of March 3, 1911, and its business transferred to District Courts. The whole country is laid out into some eighty or ninety districts and in each of these there are appointed by the President and Senate one, two, three, or four district judges, according to the amount of business to be transacted. Each of the more sparsely populated states constitutes a single district; other states are divided into two or more districts; and the great state of New York is divided into four districts.

Each large district is usually divided into "divisions" and the law provides the dates and places for holding terms of the District Court within each division. By turning to the law, anyone can find in what district he resides and the date and place for the term of court in his district or division, as the case may be. For example, the law of 1911 runs, "the state of New Hampshire shall constitute one judicial district to be known as the district of New Hampshire. The terms of the District Court shall be held at Portsmouth on the third Tuesdays in March and September; at Concord on the third Tuesdays in June and December; and at Littleton on the last Tuesday in August."

The matters which may be brought to trial in a federal District Court are so various in character and so numerous that they need to be studied only by the practising lawyer whose business it is to discover the proper forum in which his clients' business may be taken.[1] The jurisdiction of the District Court embraces (among other things) all crimes and offences cognizable

[1] In addition to this regular hierarchy of courts, Congress has created from time to time special courts. There is a Court of Claims composed of a chief justice and four associate judges whose duty it is to hear claims against the federal government. If it decides that a certain amount of money is due from the United States to any party, it cannot order payment, but must depend upon appropriations made by Congress. This Court partially relieves Congress of the great political pressure brought on behalf of private claims. Congress has also created a judicial system for the District of Columbia comprising a court of appeals, a supreme court, and minor courts of the justices of the peace, a police court, and a juvenile court. The Payne-Aldrich tariff law of 1909 created a Customs Court, consisting of a presiding judge and four associates, to which court appeals may be taken from the decisions of the Board of General Appraisers on questions of jurisdiction and law. In 1910 a Commerce Court was created to hear cases arising under the interstate commerce law, but it was abolished in 1913.

under the authority of the United States, cases arising under the internal revenue, postal, and copyright laws, proceedings in bankrupcty, all suits and proceedings arising under any law regulating the immigration of aliens or under the contract labor laws, and also all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

In close relation to the judiciary are the Department of Justice and the great army of United States attorneys and marshals in the judicial districts in the states and territories.[1] The head of the Department of Justice is the Attorney-General of the United States, who is the chief law officer of the federal government. "He represents the United States in matters involving legal questions; he gives his advice and opinion when they are required by the President or by the heads of the other executive departments on questions of law arising in the administration of their respective departments; he appears in the Supreme Court of the United States in cases of especial gravity and importance; he exercises a general superintendence and direction over the United States attorneys and marshals in all the judicial districts in the states and territories; and he provides special counsel for the United States whenever required by any department of the government." The enforcement of important federal laws, therefore, depends largely upon the activity of the Attorney-General, or rather upon the pressure brought to bear upon him by the President.

A very good example of the way in which the President may control the Attorney-General is afforded by the Tennessee Coal and Iron affair in 1909, when President Roosevelt permitted the absorption of that concern by the United States Steel Corporation in alleged violation of the Sherman anti-trust law. When the Senate demanded why prosecution was not instituted, the President replied that the Attorney-General was subject, under the laws, to the direction of himself and no one else.

In each of the judicial districts there is a United States district attorney[2] who represents the government in the prosecution and defence of causes arising within his district. There is also in each district a marshal[3] whose duty it is to enforce the orders of

[1] See above, p. 297. [2] With one or more assistants.
[3] Assisted by a number of deputies.

the federal courts, to arrest offenders against federal law, and to otherwise assist in the execution of that law. Both of these officers are appointed by the President and Senate.

The Federal Judicial Power

The jurisdiction of the federal courts is defined in the Constitution. It embraces, on the one hand, cases affecting certain *persons* or *parties* and, on the other hand, cases relative to certain *matters*.

1. In the first place, the jurisdiction of the federal courts covers cases affecting ambassadors, other public ministers and consuls; controversies to which the United States is a party; controversies between two or more states, between a state and citizens of another state, between citizens of different states,[1] and between a state or the citizens thereof and foreign states, citizens or subjects — with the provision that the judicial power shall not extend to any suit in law or equity commenced or prosecuted against one of the United States by American citizens or by citizens of foreign states. When any of these parties are involved in controversies, the case may come under federal judicial power, regardless of the nature of the matter in controversy. So much for the jurisdiction of the federal courts over parties.

2. In the next place, the federal judicial power extends to certain *matters*, regardless of the character of the parties involved in the controversy; that is, to all cases in law and equity arising under the Constitution, the statutes, and the treaties of the United States and to all admiralty and maritime cases.

A case, according to Story,[2] arises "when some subject touching the Constitution, laws, or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law." In other words, a case in law or equity comes within the federal judicial power whenever a correct decision of the controversy involves in any way the interpretation of the Constitution or federal laws or treaties.[3]

[1] Also between citizens of the same state claiming lands under grants of different states. For the purposes of suing in federal courts corporations are regarded as "citizens," but for other purposes they are regarded as "persons."

[2] *Commentaries*, Vol. II, section 1646.

[3] Of course it is often the duty of state courts to apply federal law, but provision is made for appeal from their decisions. See below, p. 308.

With the exception of two classes of cases, the Constitution does not say which of the federal courts shall have jurisdiction over any particular matter, but leaves the distribution of the judicial powers to Congress. The two exceptions are cases affecting ambassadors, other public ministers, and consuls and cases in which a state may be a party. Over such cases the Supreme Court, under the Constitution, has original, but not exclusive, jurisdiction; that is to say, whenever any such case arises, it may be taken into the Supreme Court in the very beginning, without having been previously tried in any lower court. Since, however, the Constitution does not confer exclusive jurisdiction in such matters, it is left for Congress to decide whether any other federal court or courts may also try these cases and under what limitations. Over all other cases falling within the scope of the federal judicial power, the Supreme Court has only *appellate* jurisdiction as to law and fact, subject to such exceptions and under such regulations as Congress may make.

The Great Writs

In the exercise of their judicial functions the federal courts have the power of issuing certain writs which affect very fundamentally the rights of citizens.

1. The first and most famous of these writs is that of habeas corpus. This writ is designed to secure to any imprisoned person the right to have an immediate preliminary hearing for the purpose of discovering the reason for his detention. For example, a United States marshal in the execution of the revenue laws kills a citizen of a state and is arrested and imprisoned by the state authorities. His attorney applies to some near-by federal court for a writ of habeas corpus, which writ will require the state officer having charge of the prisoner to produce him in the federal court where the reasons for his arrest and detention are to be examined.

The Supreme Court and Circuit and District courts of the United States have the power of issuing writs of habeas corpus, and the several justices and judges of these courts within their respective jurisdictions have the power of granting the writ for making inquiries into the cause of arrest. This does not mean, however, that a federal judge may issue the writ indiscriminately.

It can only be issued when a prisoner is in jail under federal custody or authority; or for some act done or omitted in pursuance of a law of the United States or the order, process, or decree of some federal court or judge; or is in prison in violation of the Constitution or some law or treaty of the United States; or is a citizen of a foreign country claiming to be imprisoned for some act committed with the sanction of his government.[1] In other words, a federal judge cannot issue a writ of habeas corpus in behalf of some person who merely claims that he is detained in violation of the law of a commonwealth. He must be a prisoner held either under federal authority, or by state authority in violation of some law of the United States.

The application for a writ of habeas corpus is made to the proper court by a complaint in writing, signed by the prisoner, setting forth the facts concerning his detention and the reasons for his imprisonment, if they are known to him, and stating in whose custody he is held. It is the duty of the judge upon application to grant the writ, unless it is evident from the application itself that the prisoner is not entitled to it under the law. Within a certain time the person to whom the writ is directed must make due return, bringing the prisoner before the judge and certifying as to the cause of his detention. The court or judge, thereupon, must proceed in a summary way to examine the facts, hear the testimony and arguments, and either release the prisoner (if he is detained in violation of the law), or remand him for trial if there is no warrant, under the law, for interfering.

2. The second writ is the writ of mandamus which is used against public officials, private persons, and corporations for the purpose of forcing them to perform some duty required of them by law.[2] The mandamus is properly used against executive officers to compel them to perform some ministerial duty.[3] Where the duty is purely discretionary and its performance

[1] Taylor, *Jurisdiction and Procedure of the United States Supreme Court*, p. 503.

[2] It was early settled by judicial decision that no federal court (except the Supreme Court of the District of Columbia) could issue the writ of mandamus except in aid of the exercise of jurisdiction acquired in some other way.

[3] An excellent example of the use of mandamus is afforded by the case of Postmaster-General Kendall, who was ordered by the Supreme Court to obey the provisions of an act of Congress directing him to pay certain sums due to mail-carriers under government contract (1837).

depends upon the pleasure of the official or upon his own interpretation of the law, the court will not intervene. In general, any one seeking the writ of mandamus to compel a federal officer to perform an act must show that he has no other adequate legal remedy and that he has a clear legal right to have the action in question performed by the officer. "It is elementary law that mandamus will only issue to enforce a ministerial duty as contradistinguished from a duty that is merely discretionary. This doctrine was clearly and fully set forth by Chief Justice Marshall in Marbury *v.* Madison and has since been many times reasserted by this Court." [1] The writ of mandamus is also often used to compel an inferior court to pass upon some matter within its jurisdiction which it has refused to hear or act upon.[2]

3. The third great writ is the writ (or bill) of injunction. This writ may be used for many purposes. Sometimes it takes the form of a mandatory writ ordering some person or corporation to maintain a *status quo* by performing certain acts. Thus, for example, the employees of a railway may be forbidden to refuse to handle the cars of some company which they wish to boycott; in other words, may be ordered to continue to perform their regular and customary duties while remaining in the service of their employer.[3] Sometimes the injunction takes the form of a temporary restraining order forbidding a party to alter the existing condition of things in question until the merits of the case may be decided. Sometimes the writ is in the form of a permanent injunction ordering a party not to perform some act the results of which cannot be remedied by any proceeding in law.

The question of injunctions has been brought into national politics by the frequency with which federal courts have issued them in labor disputes. Inasmuch as corporations are often "citizens" of some other state than that in which their striking laborers reside, it is easy for them to seek relief at the hands of the federal courts on the ground of diversity of citizenship.[4] Injunctions are also occasionally granted by the federal courts in

[1] The United States, etc., *v.* Lamont, 155 U. S. R., 308.
[2] Taylor, *Jurisdiction and Procedure*, pp. 512 ff.
[3] Judson, *The Law of Interstate Commerce* (1905), p. 127, note 3.
[4] See above, p. 301 and note 1.

cases involving interference with interstate commerce — a matter coming under federal authority. For example, during the famous Chicago strike in 1894, the federal district court in that city issued a general injunction to all persons concerned, ordering them not to interfere with the transmission of the mails or with interstate commerce in any form. Mr. Debs, who was directing the strike which was tying up interstate commerce, was arrested, fined, and imprisoned for refusing to obey this injunction. Debs thereupon, through his counsel, claimed the right to jury trial, asserting that the court could not impose a penalty which was not provided by statute. On appeal, the Supreme Court affirmed the right of the lower court to grant an order enjoining any person from interfering with interstate commerce over natural or artificial highways, and held that imprisonment for contempt of court did not violate the principle of due process of law.

Accordingly, this power of the federal courts to issue injunctions was brought into politics by working-men who claimed that those courts, in many instances, issued writs hastily, arbitrarily, and with prejudice to their legal rights. In 1908 the question was taken up by both of the great political parties. The Democratic party said in its platform: "We believe that the parties to all judicial proceedings should be treated with rigid impartiality and that injunctions should not be issued in any cases in which injunctions would not issue if no industrial dispute were involved"; and furthermore reiterated the pledges of 1896 and 1904 — trial by jury in all cases of persons arrested for indirect contempt; that is, contempt committed outside the presence of the court. On account of the stand taken by the Democratic party, Mr. Gompers, President of the American Federation of Labor, came out openly in support of Mr. Bryan and attempted to secure for him the labor vote throughout the United States.

The issue was also taken up by the Republicans. In their platform they declared, "that the rules of procedure in the federal courts with respect to the issuance of the writ of injunction should be more accurately defined by statute and that no injunction or temporary restraining order should be issued without notice, except where irreparable injury would result from delay, in which case a speedy hearing thereafter should be granted."

In his acceptance speech, Mr. Taft said that threatened unlawful injuries to business could only be satisfactorily met by an injunction to prevent them, because a suit for damages offered no adequate remedy. He furthermore urged that the interjection of a jury trial between the orders of a court and their enforcement would fundamentally weaken the power of the court. "Under such a provision," he contended, "a recalcitrant witness who refuses to obey a subpoena, may insist on a jury trial before the court can determine that he received the subpoena. The citizen summoned as a juror and refusing to obey the writ when brought into court must be tried by another jury to determine whether he got the summons; such a provision applies not only to injunctions, but to every order which the court issues against persons. A suit may be tried in the court of first instance and carried to the Court of Appeals and thence to the Supreme Court, a judgment and decree entered, and an order issued, and then, if the decree involves the defendant's doing anything or not doing anything and he disobeys it, the plaintiff, who has pursued his remedies in lawful courts for years, must, to secure his rights, undergo the uncertainties and the delays of a jury trial before he can enjoy that which is his right by the decision of the highest court of the land."

Mr. Taft, however, expressed his concurrence in the declaration of the Republican platform to the effect that the "rule of procedure in the federal courts with respect to the issuance of the writ of injunction should be more accurately defined by statute." In his message of December 7, 1909, to Congress, he made specific recommendations as to such legislation.

Finally, in 1914, after Congress had passed into the hands of the Democrats, it enacted the Clayton anti-trust law which, among other things, exempted labor from the provisions forbidding combinations in restraint of trade and limited materially the use of the injunction in labor disputes. It legalized specifically peaceful picketing and labor assemblies. It stipulated that no injunction should be issued to prohibit persons from stopping work either singly or in concert and provided trial by jury in cases of contempt committed outside of the court. During the World War, however, Congress passed the Lever law penalizing certain acts limiting production, and under this law the district judge at Indianapolis issued an injunction (1919) order-

ing striking miners to resume work. The question of the injunction thereupon became a labor issue again.

The Power of Passing upon the Constitutionality of Statutes

The jurisdiction of the federal courts extends not only to cases in law and equity in the strict sense of the word; it extends to cases involving the constitutionality of state and federal laws. It is nowhere expressly provided in the Constitution that the federal courts shall have the power to declare a statute of Congress or of a state legislature invalid on the ground that it conflicts with the Constitution. Indeed, it is contended by some writers that it was not the purpose of the framers to confer such a power, especially over federal statutes, upon the courts of the United States. For example, the Honorable Walter Clark recently declared that the federal judiciary has clearly usurped authority in this regard.[1] Long ago, Mr. Jefferson held that it was the design of the framers to establish three coördinate and independent departments of government, and that to give the judiciary the power of passing upon the acts of the other departments would be to make that branch of the government supreme over the other two branches.[2]

It is, of course, not possible to determine what was the intention of every member of the convention at Philadelphia which framed the federal Constitution; and there is reason to believe that some of them, at least, did not desire to make entirely clear the precise nature of the authority which they had conferred upon the federal judiciary. Speaking of the language of the federal Constitution, Gouverneur Morris, who was one of the leaders in the convention, wrote: "Having rejected redundant and equivocal terms, I believed it as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject conflicting opinions had been maintained with so much professional astuteness that it became necessary to select phrases which expressing my own notions would not alarm others nor shock their self-love." [3]

On the other hand, however, some of the members of the convention, even before the adoption of the Constitution, expressed

[1] See the Independent, Sept. 26, 1907.
[2] See *Readings*, p. 281.
[3] Sparks, *Life of Morris*, Vol. III, p. 323.

their belief that the federal judiciary would have the power to pass upon the constitutionality of laws. This side of the case was very plainly put by Hamilton in *The Federalist*: "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be, regarded by the judges as a fundamental law. It must, therefore, belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."[1]

At all events, whatever may have been the intention of the framers, Chief Justice Marshall, in the famous case of Marbury *v.* Madison, demonstrated with logic that has never been answered that the Court under the Constitution possesses the power of declaring statutes void when they conflict with fundamental law.[2]

Congress has provided by law the precise way in which the constitutionality of the statutes and acts of states may be tested in the Supreme Court of the United States. A case may be taken to that Court from the highest court of a state having jurisdiction over the cause, whenever the latter denies the validity of a federal treaty or statute or of an authority exercised under the United States. A case may be taken to the Supreme Court from any such state court whenever, during the trial, any statute of, or authority exercised under, the state in question is claimed to be repugnant to the Constitution, treaties, or laws of the United States, and is nevertheless upheld by the state court. Whenever a state law is declared by the state court to violate the federal Constitution, appeal also may be taken to the Supreme Court.

To make the process of testing the constitutionality of a state statute clear, let us examine a concrete case. The legislature of New York passed a law providing that no employees should be required or permitted to work in bakeries more than sixty

[1] See Beard, *The Supreme Court and the Constitution*. For colonial precedents, see the full and critical review by C. G. Haines, *The American Doctrine of Judicial Supremacy*, chaps. iv and v.

[2] For this important opinion, rendered in 1803, see *Readings*, p. 274.

hours a week, or ten hours a day. Mr. Lockner, an employing baker of New York, claimed that this statute infringed the rights which he enjoyed as a citizen under the Constitution of the United States, and resisted its enforcement. The case was carried to the highest court in the state of New York, which upheld the statute. The decision having been against the right which he claimed under the federal Constitution, Lockner thereupon carried his case to the Supreme Court of the United States, which decided in his favor, declaring the law of New York null and void as being in conflict with certain provisions of the federal Constitution.[1]

It must be noted that the federal court will take no notice of the constitutionality of a statute except when the latter is brought to its attention in the form of a case involving the rights of parties to a suit.

In deciding against the validity of a statute, the Supreme Court does not officially annul that statute, in the way in which a governor or President might veto it; it merely refuses to enforce the statute in the particular case before it. Thereupon, the executive department of the federal government, or of the state government, as the case may be, simply drops the enforcement of the law.

In no instance will the federal judiciary consider the constitutionality of any law in the abstract or render any opinion either to Congress or to the President on the validity of a proposed statute. This practice of the court was adopted early. In 1793, Washington sought the advice of the Supreme Court by proposing to that body twenty-nine different questions, which the Court respectfully declined to answer on the ground that it could give opinions only in regular cases properly brought before it in the course of ordinary judicial proceedings.[2] Federal practice in this regard, therefore, differs from that in some of the states.

[1] See *Readings*, p. 617.

[2] The Supreme Court has not declared very many acts of Congress invalid. From its foundation to 1903 it had pronounced void only twenty-one acts of Congress. In considering the constitutionality of federal statutes the Court has laid down the rule that it will not declare a law void except when there is no doubt in the mind of the Court as to its unconstitutionality. For a valuable treatment of the whole subject of judicial control over statutes, see B. F. Moore, *The Supreme Court and Unconstitutional Legislation* (Columbia University Studies).

The power of the Court to pass upon the acts of state governments was early resisted by Jefferson and the stanch defenders of states' rights. They admitted the supremacy of the federal government within its sphere, but they contended that to give the federal judiciary the right to determine the validity of state laws would enable the federal government to define its own sphere of power and thus reduce the states to mere administrative subdivisions.[1] However, the leaders of the states' rights party did not offer any adequate plan for settling amicably disputes between the federal and state governments over their respective limits of power and for obviating the endless complications that would arise from conflicting decisions in the state courts if there were no final tribunal of appeal to give uniformity to them. The logic by which the federal judiciary secures its authority to pass upon the validity of state acts is as inexorable as the logic of Marshall's opinion in Marbury *v.* Madison.[2]

Political Controversies over Judicial Authority [3]

This power of the federal judiciary to pass upon the validity of state and federal laws inevitably involves federal courts, especially the Supreme Court, in political matters. Almost every important statute is a political act by a political body, usually by a majority composed of the members of one political party; and the power to declare such an act null and void is a political power, although under our system it is exercised in the form of a judicial decision.[4] In determining the validity of statutes, especially federal statutes, the Supreme Court, on several momentous occasions, has been drawn into partisan controversies.

The most famous of all these controversies occurred in connection with the celebrated case of Dred Scott (1857), in which Chief Justice Taney, of southern origin, sought to accomplish the impossible feat of settling the slavery issue by *obiter dicta*. The central principle of Taney's opinion was that Congress had no power to prevent slavery in the territories of the United States

[1] See the Kentucky and Virginia Resolutions. McDonald, *Select Documents of United States History*, 1776–1861, pp. 149 ff.

[2] See *Readings*, pp. 140, 278.

[3] See Professor Haines's temperate review of this contentious topic, *The Conflict over the Judicial Powers* (Columbia University Studies).

[4] See *Readings*, pp. 283, 288; for Mr. Roosevelt's view, *Readings*, p. 286.

— the very question upon which the new Republican party was then staking its hopes and gaining its strength.

The response which this momentous decision met was widespread and decided. The southern states accepted Chief Justice Taney's opinion as final. At the Democratic convention in Charleston, South Carolina, in April, 1860, it was proposed that the party should "abide by the decisions of the Supreme Court of the United States on the questions of constitutional law."

In the North, however, it met with a storm of protest. The legislatures of Connecticut, Maine, Ohio, New Hampshire, Vermont, and Massachusetts passed resolutions condemning the decision.

> Whereas [run the Maine resolutions], such extra-judicial opinion subordinates the political power and interests of the American people to the cupidity and ambition of a few thousand slaveholders, who are thereby enabled to carry the odious institution of slavery wherever the national power extends, and predooms all territory which the United States may hereafter acquire by purchase or otherwise to a law of slavery as irrepealable as the organic constitution of the country; and
>
> Whereas, such extra-judicial opinion of a geographical majority of the Supreme Court is conclusive proof of the determination of the slaveholding states to subvert all the principles upon which the American union was formed, and degrade it into an engine for the extension and perpetuation of the barbarous and detestable system of chattel slavery: Therefore —
>
> *Resolved*, that the extra-judicial opinion of the Supreme Court in the case of Dred Scott is not binding in law or conscience upon the government or citizens of the United States and that it is of an import so alarming and dangerous as to demand the instant and emphatic reprobation of the country.
>
> *Resolved*, that the Supreme Court of the United States should, by peaceful and constitutional measures, be so reconstituted as to relieve it from the domination of a sectional faction. . . .[1]

Lincoln, who afterward sacrificed slavery and waged war to save the Constitution, viewed this epoch-opening decision with more calm, but he refused to accept it as the final word on slavery in the territories. Two or three months after it was rendered, he declared his belief in, and respect for, the judicial department

[1] *Senate Mis. Doc.*, No. 14, 35th Cong., 1st Sess., 1857–58.

of the government, whose decisions should control the general policy of the country until reversed by some lawful process. "We think the Dred Scott decision is erroneous," he said to his neighbors at Springfield. "We know the court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this. We offer no resistance to it." [1] But in the heat of the fray he grew less temperate in his views. A year later, in a speech at Edwardsville, he exclaimed: "Familiarize yourselves with the chains of bondage and you prepare your own limbs to wear them. Accustomed to trample on the rights of others, you have lost the genius of your own independence and become the fit subjects of the first cunning tyrant who rises among you. And let me tell you, that all these things are prepared for you by the teachings of history, if the elections shall promise that the next Dred Scott decision and all future decisions will be quietly acquiesced in by the people." [2]

Undoubtedly Lincoln accepted without reserve the declaration of the Republican platform on which he was elected in 1860: "That the new dogma that the Constitution, of its own force, carries slavery into any or all of the Territories of the United States, is a dangerous political heresy, at variance with the explicit provisions of that instrument itself, with contemporaneous exposition, and with legislative and judicial precedent; is revolutionary in its tendency and subversive of the peace and harmony of the country."

In his first inaugural address, he gave a temperate and reasoned view of the place of the Supreme Court in our system:

"I do not forget the position, assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding, in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to a very high respect and consideration in all parallel cases by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the govern-

[1] Nicolay and Hay, *Complete Works*, Vol. II, p. 321.
[2] *Ibid.*, Vol. XI, p. 110.

ment upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court the instant they are made, in ordinary litigation between parties in personal actions, the people have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them and it is no fault of theirs if others seek to turn their decisions to political purposes." [1]

It was the Democratic party that was to raise the next serious controversy, forty years after the Dred Scott decision. In 1895, the Supreme Court, by a narrow vote of five to four, declared unconstitutional the federal income-tax law passed by a Democratic Congress the preceding year; and when the Democratic national convention assembled in 1896, there was a great deal of feeling among the radical elements against what they deemed the unwarranted act of the Court in reversing a previous opinion upholding a federal income-tax law.[2] This feeling was intensified by controversies over the use of injunctions in labor disputes.[3] Leaders in the Democratic party, like Governor Altgeld of Illinois, had protested vehemently against the income-tax decision, and they carried their protests to the convention.

Accordingly Senator James K. Jones, as chairman of the committee on resolutions, brought in a platform containing two sharp attacks on the federal judiciary: "Until the money question is settled, we are opposed to any agitation for further changes in our tariff laws, except such as are necessary to meet the deficit in revenue caused by the adverse decision of the Supreme Court on the income-tax. But for this decision by the Supreme Court, there would be no deficit in the revenue under the law passed by a Democratic Congress in strict pursuance of the uniform decisions of that court for nearly 100 years, that Court having in that decision sustained constitutional objections to its enactment which had previously been overruled by the ablest Judges who have ever sat on that Bench. We declare that it is the duty of Congress to use all the constitutional power which remains after

[1] *Works*, Vol. VI, p. 179–180.

[2] For an insight into the political feeling involved in this controversy, see Mr. Choate's celebrated argument in the Income-Tax Case, *Readings*, p. 283.

[3] See above, p. 305.

that decision, or which may come from its reversal by the Court as it may hereafter be constituted, so that the burdens of taxation may be equally and impartially laid, to the end that wealth may bear its due proportion of the expenses of the government." The platform furthermore declared, with special reference to the recent Chicago strike: "We denounce arbitrary interference by federal authorities in local affairs as a violation of the Constitution of the United States and a crime against free institutions, and we especially object to government by injunction as a new and highly dangerous form of oppression by which federal Judges, in contempt of the laws of the states and rights of citizens, become at once legislators, judges, and executioners."

In vain did Senator Hill of New York protest against these clauses, denouncing them as foolish, ridiculous, unnecessary, revolutionary, and unprecedented in the history of the party. Mr. Bryan, in his crown of thorns and cross of gold appeal, replied to Mr. Hill with vehement directness: "They criticise us for our criticism of the Supreme Court of the United States. My friends, we have made no criticism. We have simply called attention to what you know. If you want criticism, read the dissenting opinions of the court. That will give you criticisms. They say we passed an unconstitutional law. I deny it. The income-tax was not unconstitutional when it was passed. It was not unconstitutional when it went before the Supreme Court for the first time. It did not become unconstitutional until one judge changed his mind; and we cannot be expected to know when a judge will change his mind." [1]

Some obvious lessons seem to come from a dispassionate review of the judicial conflicts which have occurred in our history. Criticism of the federal judiciary is not foreign to political contests; no party, when it finds its fundamental interests adversely affected by judicial decisions, seems to hesitate to express derogatory opinions; the wisest of our statesmen have agreed on the impossibility of keeping out of politics decisions of the Supreme Court which are political in their nature; finally, in spite of the attacks of its critics and the fears of its friends, the Supreme Court yet abides with us as the very strong tower defending the American political system.[2]

[1] *Official Proceedings of the Democratic National Convention*, 1896, pp. 190 ff.
[2] See *Readings*, p. 288, and above, p. 164.

CHAPTER XVI

FOREIGN AFFAIRS

The General Direction of Foreign Affairs

The Constitution of the United States contains no express provision for a Department of Foreign Affairs, and says very little about the method by which our foreign relations are to be managed. However, it impliedly makes the President the official spokesman of the nation in such matters by giving him the power to appoint our representatives abroad and to negotiate treaties with the approval of the Senate.[1]

Not only is the President the official representative in communicating the will of the United States to other countries; he is the sole official agent through whom the ministers of other countries can communicate with the United States. This has been the rule since the foundation of our government. Mr. Lee, as Attorney-General, pronounced the opinion, in 1797, that foreign ministers had no authority to communicate their sentiments to the American people by publications in the newspapers, for that would be considered contempt of this government.

While the President of the United States is our official spokesman in dealing with other nations, the actual conduct of foreign affairs is vested in the Secretary of State. The Department of State, of which the Secretary is the head, was organized in 1789 by Congress.[2] The act provided that the Secretary of State should perform such duties as the President should intrust to him, relative to correspondences, commissions, and instructions to the public ministers and consuls sent out from the United States, and also pertaining to negotiations with the public ministers from foreign states or princes.[3] In short, the Secretary is to conduct all matters respecting foreign affairs which the President may

[1] *Readings*, p. 183.

[2] It was first called the Department of Foreign Affairs, but the name was shortly changed.

[3] *Readings*, p. 291.

assign to his Department, and furthermore, he must manage the business as the President may direct.[1]

The Department of State is thus the legal organ of communication between the President and foreign countries, and is so recognized by foreign powers, for it is to the Secretary of State that they address their communications to our government. When the French minister, in 1793, directed a letter to the President of the United States, the Secretary replied that it was not proper for diplomatic representatives residing here to institute correspondence with the chief executive.[2] Of course, in actual practice this strict official routine is not always observed; many questions of foreign policy are undoubtedly considered by the President in his informal relations with the ministers of other countries. In final analysis, the practice depends on the nature of the business and the personality of the President.

It is through the Secretary of State, also, that the President transmits letters and papers to foreign governments, and the latter must recognize as official only those communications which come through this agency. No officer of the United States, civil or military, should address a foreign government, except through the Department of State, or our diplomatic representatives abroad. Even when the President writes to a foreign ruler an autograph letter of condolence on the death of a relative, it is countersigned and transmitted by the Secretary of State.[3]

The important business of the Department has the personal attention of the Secretary. International disputes, questions of general policy, or any matters of great weight, are considered by him, and he keeps in close touch with the President, discussing with him, and sometimes with the entire Cabinet, matters of special significance.

[1] *Readings*, p. 200.

[2] The communications thus made to the Department of State are transmitted to the President whenever they are deemed of sufficient importance, or there are special reasons for such an action.

[3] The President himself may draft a despatch to a foreign country, with or without the advice of his Cabinet, but the despatch is signed by the Secretary, so that all communications appear to be through him officially. Congratulatory letters which the President signs are sometimes even drafted by a clerk in the Department of State.

Official Representatives of the United States in Foreign Countries

The representatives of the United States charged with conducting our relations with other countries fall into two general groups: diplomatic and consular.

I. The first of these groups is divided into four classes: (1) ambassadors extraordinary and plenipotentiary; (2) envoys extraordinary and ministers plenipotentiary and special commissioners; (3) ministers resident; and (4) *chargés d'affaires.*

This classification originated in the ceremonials of European courts which gave precedence in processions and social affairs to diplomatic representatives according to their rank. In the international congresses of the seventeenth and eighteenth centuries, there was constant wrangling over the positions to be assigned to representatives of various countries; and it was finally decided by the practice of the nineteenth century that nations were equal when their representatives were assembled in general congress for negotiations; but in each country the old custom of assigning to diplomatic agents social and official positions in accordance with their rank was continued.

For over a century the United States did not send ambassadors extraordinary and plenipotentiary, but was represented abroad only by agents falling within the second, third, and fourth classes. It thus came about sometimes that a minister of the United States was compelled, on public occasions, at receptions, and in interviews with foreign officers, to step aside in favor of the representative of some small nation, who happened to bear the title of ambassador. Though all European courts did not follow this rigid system, American ministers were often mortified by treatment which was deemed humiliating to the spokesmen of so great a nation. Accordingly, in 1893, Congress provided that our representative to any foreign country should have the same rank as the representative of that country to the United States.[1] Therefore, whenever a nation sends an ambassador to us, we return the honor. This means, of course, that more money must be spent in maintaining the higher rank, but Congress has not made a proportionate increase in salaries.[2]

[1] Sometimes, however, we take the initiative in raising the rank by making overtures to other countries, as in the case of Turkey.

[2] On this point, *Readings*, p. 295.

All diplomatic representatives of the United States are nominated by the President and appointed by and with the advice and consent of the Senate. In spite of the special knowledge and experience which are required of those who enter the diplomatic service, our representatives have been too often selected without regard to their qualifications. Diplomatic appointments are made too frequently as rewards for political service. As Secretary Hay once remarked, "A quiet legation is a stuffed mattress which the political acrobat wants always to see ready under him, in case of a slip." The term of office is uncertain and liable to be brief, for, whenever a change of party occurs at Washington, there is a general change in our representation abroad. There is no arrangement for prolonged tenure of office, beginning with the lower grades of the diplomatic service and ending with a position at the foremost court of Europe.[1]

In nominating ministers, the President should always ascertain in advance whether any particular appointee is personally acceptable to the government to which it is proposed to send him.[2] After his appointment, a minister is given a formal letter of credence, and on his arrival at his foreign post he must at once enter into communication with the representative of that government in charge of foreign affairs. It is customary for the minister's predecessor to remain until his arrival and arrange for his induction into office. It is also customary for the minister to be received in audience by the head of the government to which he is accredited; and the ceremonials at that audience are conducted in accordance with the custom of the country in which it is held.

The necessity of mastering the somewhat intricate ceremonies of foreign courts has been at times a source of trepidation to American representatives. Mr. John W. Foster relates an amusing incident of his reception at the court of Russia in the great hall

[1] President Roosevelt, however, in 1905, issued an order that the important office of secretary to embassies or legations should be filled by transfer or promotion from some branch of our foreign service, or by the appointment of persons whose qualifications had been determined by an examination. Moreover, within recent years, there has been a tendency toward the elimination of the grosser forms of politics from diplomatic appointments. This service was still further advanced by an executive order of November 26, 1909, making the examinations more difficult.

[2] For the illustrative case of Mr. Keiley, see Foster, *Practice of Diplomacy*, p. 40.

of the Anitchkoff Palace. He was required after the interview to retire backward, down the long hall, with his face fixed upon the Grand Ducal party and to make his farewell bow on reaching the door. He states that he succeeded in getting to the entrance without knocking over any furniture, but that his hand fell unfortunately upon one of the two knobs which did not open the door but merely turned round and round, much to his vexation and embarrassment. In the midst of his perplexity, the Tsaravitch, seeing his predicament, cried out in excellent English: "Mr. Foster, take the other knob!" He at once heeded this advice and bowed himself out of the imperial presence.[1]

A diplomatic mission abroad may be closed by one of two methods. A minister may exercise his constitutional right of resigning at pleasure, or he may be recalled by the President, perhaps at the request of the foreign government. In an extreme case, he might be summarily dismissed by the government to which he is accredited.

A diplomatic representative enjoys abroad, under the rules of international law, several special privileges and immunities.[2] Any injury or affront to him is an offence against the country which he represents and the principle of international comity. The house in which he resides is under the particular protection of the law; it may not be entered or disturbed by any one against his will. A minister is entitled to special protection while travelling on land or sea. He and his official family, including even his domestic servants, are exempt from arrest, — in short, from all criminal and civil processes at all times.

The functions of our diplomatic agents may be given in the language of a report made by the Department of State some years ago.[3] According to this report the duties of ministers are not confined to the transmission of instructions from their government. Official communications, indeed, constitute a relatively unimportant part of the minister's business. He should cultivate friendly personal relations with the officers of the government to which he is accredited, so that on proper occasions he may have easy access to them and, having thus gained their confidence in advance, may converse freely with them; it is, therefore, neces-

[1] Foster, *The Practice of Diplomacy*, p. 60.
[2] Moore, *International Law Digest*, Vol. IV, p. 622.
[3] *Executive Documents*, No. 146, p. 17; 48th Cong., 1st Sess.

sary for the ambassador to adapt himself to the mode of life of the official class of the country in which he is stationed. To do this, he must study the sensibilities, prejudices, form of government, and spirit of public life there. When issues arise between his country and the foreign government, he must endeavor to adjust matters as informally and genially as possible, without resorting to any official representations or discussions. Many examples might be cited of American citizens being spared serious inconvenience, imprisonment, or loss of property by the informal and confidential interposition of our ministers with official friends in foreign governments, whereas formal complaints made openly by the citizens might easily have led to tedious discussions and endless delays, to say nothing of the liability of arousing unfriendly feeling by public controversies. Thus, the real successes of diplomacy are usually not heralded far and wide, and are unknown save to the few immediately involved in them. As the report concludes, a diplomat does his duty by discharging innumerable daily obligations that attract no attention; and he may be regarded as successful just in proportion to the constant tranquillity which he is able to maintain in the relations of his government with the foreign country.

The Honorable Andrew D. White in his *Autobiography* [1] gives an interesting account of his life as representative at Berlin and incidentally affords insight into the character of the duties which fall upon a minister abroad. Almost every conceivable case involving the relation of Americans to the German government seems to have come within the range of Mr. White's experience. Hardly a day passed without the necessity of engaging in some kind of a skirmish with the German minister of foreign affairs over the rights of the German-Americans in the Fatherland. One American, moved by patriotic impulses, denounced, in a crowded railway carriage, Germany, the German people, and the German Imperial Government; and, after passing the night in the guard-house, sought relief at the hands of our minister. Another American, who thought that he ought to get married in Berlin as easily as in New York City, appealed to him for aid in getting through the complications of the German law of matrimony. Then there were vexatious questions with regard to the tariff. The commer-

[1] Vol. I, pp. 534–547.

cial interests in Germany, anxious to protect themselves against competition, had secured very naturally some rather severe discriminations against American products, and the American manufacturers affected by these discriminations laid upon the ambassador the heavy duty of conducting negotiations with the German foreign office and members of the imperial cabinet, with a view to securing modifications in the German tariff. Americans in distress, real or imaginary, were always appealing to him. American statesmen, out of natural curiosity and with a view to the social advantages to be derived for themselves and their families, were constantly seeking introductions to high officials. Scholars desiring access to documents and special information of many kinds expected the minister to pronounce the "open sesame"; and American manufacturers and merchants looked to him to discover for them easy methods of approach to German commercial men. The minister's duties went even farther. Any American who wanted his genealogy looked up in Germany felt free to call upon him for assistance; and that large class of persons who were constantly expecting to inherit fortunes abroad likewise relied upon their minister to keep track of their interests.

Long practice [1] seems to have established certain rules for the general guidance of diplomatists.[2] A public minister ought not to act as the agent for the collection of private claims; and he is under no obligation to prosecute investigations for private persons. It is also the duty of diplomatic representatives of the United States scrupulously to abstain from interfering in the political controversies of the countries to which they are accredited. It is not deemed advisable for ambassadors to make public addresses, except on festal occasions, and even then they should be extremely cautious in referring to politics in any form. This principle was asserted by the House of Representatives, in 1896, in a resolution censuring Mr. Bayard, then ambassador to Great Britain, for a speech made in Edinburgh in which he criticised the protective tariff in the United States rather severely.

In addition to the regular diplomatic agents, the United States has often employed special missions for the purpose of conducting negotiations with foreign countries.[3] Such missions are commonly

[1] See the Rules of the Department of State.
[2] Moore, *International Law Digest*, Vol. IV, pp. 565 ff.
[3] Foster, *The Practice of Diplomacy*, chap. x.

used to manage peace negotiations — the most recent example being the commission, headed by President Wilson, that went to Paris in 1918 to conclude with Germany and Austria the details of the treaty which closed the Great War. Another noteworthy mission was that intrusted by President Fillmore to Commodore Perry, in 1852, authorizing him, as a special plenipotentiary, to open relations with the Emperor of Japan. The results of this mission are too well known to need recounting here.[1]

II. The United States is also represented abroad by consuls,[2] who are primarily our commercial agents and perform a large number of routine duties. Consuls of all grades,[3] like ambassadors, are appointed by the President with the approval of the Senate.

Our consuls are divided into three groups: (1) consuls-general-at-large — travelling representatives who inspect the consulates of the United States throughout the world; (2) consuls-general, who supervise the entire consular systems of particular countries;[4] and (3) consuls,[5] stationed at innumerable points in every civilized country of the globe. To these three groups may be added vice-consuls and consular agents who act as representatives within any particular consular district under the direction of the regular consul.

Inasmuch as the consular service is of special importance to the commercial and industrial interests of the country, there has been growing up within recent years a demand for higher standards

[1] Every American diplomatic representative abroad has a staff of assistants, varying in number according to the quantity of business of the country to which he is accredited. The first secretary of an embassy or legation should be a man of long diplomatic experience, well acquainted with the officials and the customs of the country in which he resides. Owing to his special qualifications, he assumes, as *chargé d'affaires ad interim*, all of the duties of a minister in case of the absence of that official. He enjoys also the privileges and immunities of a diplomatic representative in international law. There is a tendency to attach more importance to the office of secretary to legations, and to make that branch of the public service more attractive. There are usually two or three additional secretaries and a number of clerks and interpreters.

[2] Moore, *International Law Digest*, Vol. V, chap. xvi.

[3] Except vice-consuls and consular agents whose appointments are not ratified by the Senate, United States *v.* Eaton, 169 U. S. R., 331.

[4] In some countries more than one consul-general is appointed.

[5] Consuls in exterritorial countries have a peculiar position. Below, p. 325.

of efficiency in that branch of public service. As long as the consular offices were regarded as the legitimate spoils of the politician, little attention was paid to real qualifications, and the service was constantly disturbed by rapid changes in the personnel. It is clear that long experience is a most important qualification for a consul. He should be a thorough master of the language of the country in which he is stationed, and a careful student of the markets, the conditions of the export and import trade, and the opportunities for commerce in that country. Finally, inasmuch as his varied and complicated duties must be conducted under an elaborate code of laws, he needs some legal training. It is evident, therefore, that service to a political organization in some inland town or congressional district does not qualify a man to act as the consular representative of the United States.

On his appointment as Secretary of State, Mr. Root took immediate steps toward the reorganization of the American consular system,[1] and, largely on his initiative, Congress passed, in 1906, a law entitled "An Act to provide for the Reorganization of the Consular Service of the United States." This law classified and graded the consuls in such a way as to enable the President to extend the merit system to that branch of the public service. Under this Act, the President adopted a method by which important vacancies are to be filled either by promotions of men whose ability has been tested in the service, or by the appointment of candidates who have passed oral and written examinations showing their fitness for the work.[2]

The specific powers and duties of consular officers[3] are found in the "Consular Regulations of the United States." First and foremost, the consular officer is a commercial representative. He must certify the invoices of goods intended for exportation to the United States; and to do this correctly he must have a wide knowledge of the character and value of the goods produced for export within his particular district. He must, furthermore, be a master of every detail of our tariff system in order that he may coöperate with our customs officials at home in securing a correct valuation

[1] Reinsch, *Readings*, p. 658.

[2] *Ibid.*, pp. 671 and 674.

[3] Foster, *The Practice of Diplomacy*, pp. 222 ff.; Moore, *International Law Digest*, Vol. V, pp. 93 ff.

of all goods and in preventing smuggling and violations of the customs law.

An equally important commercial responsibility placed upon the consul is that of aiding in the extension and increase of American trade abroad. It is his duty "to make a deep and special study of the industrial and mercantile conditions existing in his district. He must know what the country needs or would take in raw materials, in commodities, and in manufactured articles. He should learn how these needs are being supplied with particular attention to those of them which the American producer — farmer, miner, manufacturer, or merchant — might supply. He should investigate and report as to whether the American import could not, by a change in form or by variation in manufacture, by a different method in packing, by a more convenient accommodation in payment, or in any other way be brought into greater demand, and American trade be thus increased. . . . Also in some countries government contracts are an important item in the competition for import orders. Therefore, it may be wise for us, as some European governments have done, to appoint commercial attachés to some of our legations and embassies." [1]

In connection with our shipping and seamen the consul has many duties. When an American vessel touches at a foreign port, the master must deposit his register with the consul of the United States, and before clearing he must secure the return of his papers. The consul has some jurisdiction over disputes between the masters, officers, and men of American vessels; he may discharge seamen from their contracts; it is his duty to hear the complaints of American seamen in foreign ports and also to give relief to the seamen of an American vessel when in distress. The consul is expected to make innumerable reports to the State Department in Washington, which are edited and transmitted to the Department of Commerce for publication.

The functions of the consul are not yet exhausted. He is called upon to intervene with local authorities in behalf of his countrymen whenever they get into trouble in his district. He administers oaths, takes depositions, authenticates public documents, acknowledges deeds and other instruments, acts as a witness to

[1] Reinsch, *Readings*, p. 652.

marriages which occur in the consulate, administers, under certain circumstances, the estates of citizens of the United States dying abroad. Consuls whose salaries are below $1000 a year may undertake the transaction of private business not conflicting with other consular duties, though in such cases they act as private persons and not as official representatives. In some states, notably China, Siam, Persia, Korea, and Turkey, our consuls exercise, to a greater or less extent, jurisdiction over American citizens within their respective districts.[1]

The Treaty-making Power

The Constitution of the United States provides that the President, by and with the advice and consent of the Senate, two-thirds of the Senators present concurring, may make treaties; and that treaties so made under the authority of the United States shall stand with the Constitution and the acts of Congress as the supreme law of the land. No express limitations whatever are placed on this treaty-making power; and the question has been raised whether the federal government may make treaties with foreign countries relating to other than purely federal matters.

Jefferson laid down four rules with regard to the treaty-making power. He said: (1) it must concern foreign nations; (2) it was intended to comprehend only those subjects which are usually regulated by treaty and cannot be otherwise regulated; (3) the rights reserved to the states must be excluded from the scope of the treaty-making power, for the President and Senate ought not to be allowed to do, by way of treaty, what the whole federal government was forbidden to do in any way; and finally (4) the President and Senate should not negotiate treaties on subjects of legislation in which participation is given by the Constitution to the House of Representatives. The application of the principles laid down by Jefferson would, of course, greatly restrict the

[1] This custom of giving consuls jurisdiction over American citizens originated in the great differences which existed between the law and procedure of many non-European countries and those of the United States — differences which made the citizens of the United States unwilling to submit to the jurisdiction of native tribunals. Such jurisdiction was once possessed by our consuls in Japan, but the law of that country took on more and more the form of the Western law, and our consular jurisdiction was abolished in 1899.

treaty-making power of the federal government. Nevertheless it was once said by the Supreme Court that whenever an act of Congress would be unconstitutional as invading the reserved rights of the states, a treaty to the same effect would be unconstitutional.[1]

However, in practice these limitations are not recognized. Indeed, the courts have held valid a number of treaties relative to matters which are ordinarily regulated by state governments. For example, some years ago a Russian died in Cambridge, Massachusetts, leaving personal property, and according to the law of that commonwealth the local officer undertook the settlement of the estate of the deceased. The Russian consul for the district, however, showed that, by a treaty between his country and the United States, he had the right to administer the estates of his deceased countrymen there, and his claim was upheld.[2]

It is also maintained on good authority that the federal government can intervene in the administration of the criminal law of a state, where the treaty rights of foreigners residing in the United States are involved. President Harrison in a message in 1891 said: "It would, I believe, be entirely competent for Congress to make offences against the treaty rights of foreigners domiciled in the United States cognizable in the federal courts. This has not, however, been done, and the federal officers and courts have no power in such cases to intervene, either for the protection of a foreign citizen or for the punishment of his slayers." [3] Congress, notwithstanding the suggestion, has not yet seen fit to confer such jurisdiction on the courts.

This right of the federal government to make treaties pertaining to matters which are clearly within the sphere of state legislation raises many very practical questions, and will require far more serious consideration as our relations with other peoples increase. An excellent example of the importance of this problem is afforded by the long dispute over the exclusion of Japanese children from the regular public schools of San Francisco, which, it was claimed by Japan, was a violation of treaty rights. Now, there is no doubt that the federal government ordinarily has no power whatever to interfere with the public

[1] Prevost *v.* Greneaux, 19 Howard, 7.

[2] Moore, *International Law Digest*, Vol. V, p. 125.

[3] *Messages and Papers of the Presidents*, Vol. IX, p. 183.

schools of a state, for a state may abolish schools if it pleases, or prescribe such conditions as it sees fit. It was strongly urged by Democratic members of Congress that if the President and Senate could make treaties disposing of matters so distinctly reserved to the states, the treaty-making power was above and beyond the Constitution, and the rights of the states were placed at the disposal of the executive of the nation and the senatorial council. It is clearly evident that the issue raised in that controversy was of no mere temporary significance.

Furthermore, in actual practice, matters are regulated by treaty which may at the same time be the subjects of legislation by Congress. For example, Congress has power to regulate commerce with foreign nations, but the President and Senate, by virtue of their treaty-making power, may make stipulations with foreign countries regulating such commerce.[1]

The Negotiations of Treaties

In the negotiation of treaties, the President may resort to many devices. He may go abroad and take part in negotiations himself as did President Wilson when, in 1918–19, he participated in the formulation of the treaty that concluded the World War. He may commit the undertaking to the Secretary of State; he may employ an ambassador, a minister, a *chargé d'affaires*, or, if he likes, he may select some private person who, in his opinion, is peculiarly fitted for the work by his skill, or acquaintance with the language and customs of the country with which the negotiations are carried on.

The extent to which the Senate under its right to advise and consent may participate in the actual negotiation of treaties is by no means settled. On the one hand, it has been maintained that it is the constitutional right of the President to negotiate treaties without any interference from the Senate, and that he need only submit the final document to that body for action.[2] On the other hand, it is claimed by eminent authorities that the Senate may share in treaty-making at any stage, and may even advise the President to negotiate a particular treaty.

Certainly the framers of the Constitution believed that the

[1] Below, p. 392.

[2] On this matter, see *Readings*, p. 297.

President should consult the Senate in the negotiation of treaties; and President Washington stated to a committee of that body that in all such affairs even oral communications were necessary. He argued that in negotiations there are many matters that require not only consideration, but sometimes an extended discussion which would make written communications tedious and unsatisfactory. Accordingly, he visited the Senate in 1789 to lay before it papers relating to the negotiation of a treaty with an Indian tribe. He made a brief statement and then put several questions to the Senate, asking its advice in the form of affirmation or negation. The Senate postponed action on these questions, but finally prepared answers to them.

Although Washington later ceased to make personal visits to the Senate, he constantly consulted with that body on the negotiation of treaties, by means of written communications. For example, in 1790, he sent to the Senate three questions relative to the negotiation and terms of a certain treaty. However, he did not always follow this practice,[1] and his successors have seen fit to do so only under exceptional circumstances.

For instance, President Polk, in 1846, laid before the Senate a draft of a treaty presented to the Secretary of State by the British envoy proposing an adjustment of the Oregon question; and asked the advice of the Senators as to what action, in their judgment, was proper to take in reference to the treaty. There were, of course, peculiar political reasons[2] which actuated the President on this occasion, but he justified his conduct by a reference to the practice of President Washington. This example was likewise followed occasionally by President Lincoln and President Grant; and in 1884 President Arthur submitted to the Senate a proposal from the King of the Hawaiian Islands, relating to a reciprocity treaty, before taking the first steps in its negotiation.

In more recent times it has been the custom of the Secretary of State to consult influential Senators[3] with reference not only to treaties already negotiated, but also as to the advisability of opening conferences with the representatives of foreign powers

[1] For example, note the history of the Jay treaty with Great Britain.

[2] Reeves, *Diplomacy of Tyler and Polk*, p. 263.

[3] Especially with the members of the important Senate committee on foreign relations.

on particular matters. Mr. Hay[1] frequently asked the Senators what they thought of various propositions, whether the subject-matter was a proper one for negotiation, and whether other provisions should be incorporated. Senator Bacon, in 1906, stated that it was his belief that Secretary Hay conferred with many Senators either in writing, or in person, as to the general arbitration treaty while it was in process of negotiation. Mr. Bacon further said: "I recollect distinctly the Alaskan treaty. Time after time and time after time Mr. Hay, then Secretary of State, conferred with Senators, and, I presume, with all the Senators, as to the propriety of endeavoring to make that treaty and as to the various provisions which should be incorporated in it, recognizing the delicacy of the situation; and the provisions of that treaty were well understood by members of the Senate and approved by members of the Senate before it was ever formulated and submitted to Sir Michael Herbert."[2]

Not only has the Senate thus asserted the right to participate in the negotiation of treaties; it sometimes seeks to initiate, by way of resolution, negotiations with foreign countries. Furthermore, a claim to the right of sharing in the initiation is sometimes made by the House of Representatives. For example, the Senate and the House once adopted a resolution requesting the President to open negotiations with other powers, with a view to making arbitration treaties providing for the peaceful settlement of international disputes. The President later complied with this suggestion. Congress even went so far, in 1902, as to pass an act advising the President as to the terms which should be incorporated in a treaty.[3]

When the terms of a treaty are all adjusted with the foreign power, the final draft is laid before the Senate, and it may be

[1] Secretary of State from 1898 to 1905.

[2] *Congressional Record*, Vol. XL, Part 3, pp. 2129–2130.

[3] Even the House of Representatives alone has gone so far as to attempt to participate indirectly in the negotiations of treaties. It can with perfect propriety request the President to submit to it papers relating to the work of the executive department; and in 1796 it asked the President, by resolution, to lay before it a copy of the instructions to the minister of the United States who negotiated the treaty with Great Britain, together with other documents relating to the treaty, excepting such papers as the President might deem improper to disclose. Washington responded that the House had no share in the treaty-making power and declined to transmit the papers.

approved, amended, or rejected. Like nominations to federal offices, treaties are acted upon in an "executive session," which is supposed to be secret. In practice, however, its transactions are invariably reported in more or less accurate detail in the press, and indeed sessions for the general discussion of treaties may be open. A treaty rejected by the Senate may be returned by the President to that body for reconsideration.

When the Senate approves a treaty, it is sent to the President, who ordinarily completes the process by the formal exchange of ratifications with the representative of the foreign country. If he sees fit, he may refuse to take this final step, and thus prevent a duly signed and approved treaty from going into effect. This power of holding up a treaty is based on the ground that, through the agents of the federal government abroad, the President has access to sources of information closed to the Senate, and may discover at a late hour satisfactory reasons for not exchanging the ratifications. If the Senate amends a treaty, the President, of course, must secure the acceptance of the changes by the foreign power concerned. When the treaty is at last completed, it is made a part of the law of the land by an official proclamation. It is enforced by the appropriate authorities and applied by the courts in concrete cases in the same way as any other law.

World Politics

It is an American tradition that the United States enjoys a splendid isolation from the rest of the powers of the world — especially of Europe. Accordingly, the entrance of the United States into "world politics" since the Spanish War is quite commonly regarded as a violation of our historic policy. This tradition of isolation runs back to the beginning of our history as an independent nation. It was voiced by Washington in his Farewell Address, in which he advised his countrymen to extend their commercial relations, but warned them to have as little political connection with Europe as possible. "Europe," he said, "has a set of primary interests which to us have none, or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence it would be unwise in us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships or en-

mities. . . . It is our true policy to steer clear of permanent alliances with any portion of the foreign world."

The very commercial interests, however, which Washington urged his countrymen to develop in the world's markets have been, from the beginning, drawing us more and more into the current of world politics; and at no time has the United States refused to defend American commercial enterprise in any part of the globe. When the Pasha of Tripoli, discontented with the tribute paid him, chopped down the American flag, President Jefferson immediately ordered a fleet to the Mediterranean. Commodore Preble, who was sent over in 1803, bombarded the city of Tripoli and forced the Pasha to come to terms. Again, in 1812, the Dey of Algiers grew restive on hearing of the war between the United States and Great Britain, complained of the small amount of tribute which he received, and expelled the American consul-general and American citizens from his territory. At the close of the war, Congress passed an act for the protection of American commerce against Algerian cruisers; Bainbridge and Decatur, with two squadrons, were speedily despatched to the Mediterranean, and in a short time the Dey of Algiers came to terms, agreeing not to levy any more tribute on the United States. Thus by our vigorous action we helped to rid the Mediterranean of the Barbary freebooters.

Again, in 1843, immediately after Great Britain had battered down the Chinese wall of exclusion, the federal government sent Caleb Cushing to China to obtain for the United States those commercial privileges which had been so recently extended to the British. It was due to the initiative of the United States that Japan was opened to Western trade. In 1853 Commodore Matthew C. Perry, in command of a squadron of four vessels, and bearing a special mission from the United States, demanded as a right, not as a favor, "those acts of courtesy which are due from one civilized nation to another"; and by a firm policy brought the Japanese imperial government to terms in the treaty of March 31, 1854.

Many examples might be given illustrating the forceful manner in which the government has protected American commercial interests in the four corners of the world; but it is sufficient to say that we have been a world power, as far as has been necessary, from the beginning of our history. In a word, the protection

of our government has steadily advanced with the extension of our material interests, and the foreign policy of the last ten years is no breach in our historical development.

In a way, of course, this is not a violation of the principles laid down by Washington in his Farewell Address, for it was against entangling alliances — not commercial relations — that he warned us. The protection of those very commercial interests, however, has drawn us into intimate connections with other foreign powers, and may at any time lead to the necessity of coöperating with them in military expeditions. For example, American troops were found alongside those of Russia, Germany, Japan, Britain, and the other powers in the recapture of Peking and the reëstablishment of foreign rights in Chinese territory after the disorders of 1900. A near approach to a formal alliance in the protection of American interests was made in November, 1908, when Ambassador Takahira of Japan, and Secretary Root for the United States, by an exchange of formal notes, announced their agreement on the following principles: the two countries are to develop their commerce on the Pacific Ocean freely and peacefully; they have no aggressive intentions, but wish to maintain the status quo in that region and the open door in China; they are firmly resolved to respect each other's territories; they are determined to preserve the independence and integrity of China and the principle of equal opportunity for all countries to carry on trade and commerce there; and, in case of any event disturbing the above principles, the two governments will confer on the most useful measures to be taken.

The menace to American interests threatened by the terrible military power of the German Imperial Government and the depredations committed by the German submarines inevitably drew the United States into the sphere of the great European conflict that opened in 1914. Isolation, never complete, now became more impossible than ever.

The United States, furthermore, participates from time to time in the assemblies and councils of foreign nations. American representatives were sent to Berlin, in 1884, where a European Congress was held for the purpose of adjusting territorial questions in Africa and deciding the fate of the Congo Free State. Again, in 1906, American representatives were sent to the conference at Algeciras in Spain, where certain conflicts among

European powers over their respective interests in Morocco were adjusted. The United States also took a very prominent part in the Hague conferences of 1899 and 1907; President Wilson was the first statesman of high authority to propose a League of Nations to prevent wars. It was mainly as a result of his labors that the League of Nations Covenant was included in the treaty of Paris in 1919. It is apparent that the "splendid isolation" of the United States has never been possible in practice. Moreover, no political doctrines with regard to our independence from the rest of the world are strong enough to overcome forces which are linking our destinies to those of the world at large.

The Monroe Doctrine

No description of the foreign policy of the United States is complete which does not take into account the Monroe Doctrine as applied to the Latin-American countries in their several relations with the European powers. It would be misleading, however, to attempt a definition of the Monroe Doctrine in the abstract; for it was enunciated under peculiar historical circumstances and has taken various forms from time to time.

It originated during the first quarter of the nineteenth century, partially as the result of the fear of European despotism entertained in the United States, but more especially as the result of an attempt to secure for American traders and merchants a large share of the economic advantages to be derived from the independence of the former Spanish colonies. Spain had systematically endeavored to monopolize the trade of her American possessions; and thus the United States and England — the two great trading nations especially anxious to develop their interests in Latin-America — were legally excluded from a rich field of enterprise.[1] When Napoleon placed his brother Joseph upon the throne of Spain, in 1808, the Spanish-American colonies resisted the rule of the new monarch and began to taste the sweets of commercial freedom before their long struggle for independence was brought to a successful conclusion. American and English merchants were quick to seize the opportunity of opening up profitable trade relations with these new states which, after

[1] Smuggling had been going on, however, for more than two centuries in spite of Spain's protests.

three centuries of subjection to Spanish monopoly, were only too eager to seize the occasion to buy freely in the cheapest market and sell in the dearest.

Spain, however, was loath to surrender these colonies and the lucrative business with them; but when, in 1820, she was preparing an expedition to suppress the war for independence in America, a serious revolution broke out within her own borders and quickly spread over into Italy. It looked for a time as if the whole settlement, which had been reached by the powers at Vienna in 1815 after the downfall of Napoleon, would be undone by revolutionary violence. Anticipating such a danger, Austria, Prussia, England, and Russia had formed an alliance in 1815 for the express purpose of maintaining the restored Bourbon king in France and preventing a renewed disturbance of the peace of Europe. In order to effect their ends, these powers agreed to hold periodical meetings for the purpose of reviewing their interests and taking such measures as should be deemed necessary for the preservation of public order.

Shortly before this agreement was reached, the monarchs of Austria, Prussia, and Russia, on the suggestion of the Tsar Alexander I, had formed a sort of a pious alliance, according to which the three rulers were to view one another as brothers and "delegates of Providence to govern three branches of the same family," and to base their policies "upon the sublime truths which are taught by the eternal religion of God our Saviour."[1] This agreement was known as "The Holy Alliance" — a term which was afterwards quite indiscriminately applied to the combined powers of Europe in their efforts to maintain the settlement of Vienna.

As soon as the revolution of 1820 broke out in Spain, Metternich, the astute Austrian diplomat, invited Russia, Prussia, France, and England to unite in suppressing the development of "revolt and crime." In 1822, the representatives of these powers met at Verona to discuss their common interests and decide what should be done with Spain. At this Congress all of the powers, except England, were anxious to devise a plan by which

[1] For this remarkable document, see Robinson and Beard, *Readings in Modern European History*, Vol. I, p. 384: and for a more extended account of the European situation, see Robinson and Beard, *Development of Modern Europe*, Vol. I, p. 357.

they might aid Spain in reconquering her rebellious colonies, although as a matter of fact they were really in no position to afford the necessary military support. England, however, refused to coöperate, partially because of the more liberal spirit prevailing among her people, but more especially because her economic interests were certainly on the side of the revolutionary Spanish colonists with whom she had developed a lucrative trade.

The United States occupied about the same economic position; and, in view of what seemed a serious intervention in American affairs by the great despotic European powers, President Monroe, in his message to Congress of December, 1823, called attention to the impending dangers, and added: "We owe it therefore to candor and to the amicable relations existing between the United States and these powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have on great consideration and on just principles acknowledged, we could not view any interposition for the purpose of oppressing them or controlling in any other manner their destiny by any European power in any other light than a manifestation of an unfriendly disposition toward the United States." In the same message in which this doctrine was announced there was another significant declaration, called forth by a decree of 1821 issued by the Tsar of Russia, claiming the northwest shore of North America down to the 51st parallel. With regard to this claim President Monroe declared, "that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers."

In the course of time the principles announced in this famous message came to mean, practically, that the United States, while respecting the existing rights of European nations in this hemisphere, would oppose any intervention interfering with the freedom of self-government in any territory whose inhabitants had cast off European rule. When a dispute arose between Great Britain and Venezuela over the boundaries of their respective territories, Mr. Olney, then Secretary of State under Mr. Cleve-

land, declared (in 1895) that, while the United States did not intend to help relieve any Latin-American state from its obligations under international law, and did not intend to prevent any European government, directly interested, from enforcing such obligations or inflicting punishment for a breach of them, it would not permit any European country or combination of countries to "forcibly deprive an American state of the right and power of self-government and of shaping for itself its own political fortunes and destinies." The strong stand taken by President Cleveland in this interpretation of the Monroe Doctrine kindled the war spirit; but fortunately the dispute was peaceably settled by arbitration. Again, in 1901, when Germany was about to bring force to bear upon Venezuela for the satisfaction of claims, President Roosevelt declared: "the Monroe Doctrine is a declaration that there must be no territorial aggrandizement by any non-American power at the expense of any American power on American soil. . . . We do not guarantee any state against punishment, if it misconducts itself, provided that punishment does not take the form of the aquisition of territory by any non-American power."

Alongside this interpretation of the Monroe Doctrine as "the principle of the limitation of European power and influence in the western hemisphere" [1] has come a correlative doctrine that the United States must accept, to some degree, responsibility for the conduct of the Latin-American countries which are to be defended against European aggrandizement. This correlative principle President Roosevelt announced in 1904: "If a nation shows that it knows how to act with decency in industrial and political matters, if it keeps order and pays its obligations, then it need fear no interference from the United States. Brutal wrong-doing or impotence which results in the general loosening of the ties of civilized society may finally require intervention by some civilized nation, and in the western hemisphere the United States cannot ignore its duty." [2] This same view was taken by President Taft in his message of 1909: "With the changed circumstances of the United States and the republics to the south of us, most of which have great natural resources,

[1] J. B. Moore, *American Diplomacy*, p. 162.

[2] Moore, *op. cit.*, p. 165. See above, p. 197, for the Santo Domingo affair illustrating this point.

stable government, and progressive ideals, the apprehension which gave rise to the Monroe Doctrine may be said to have nearly disappeared, and neither the doctrine as it exists nor any other doctrine of American policy should be permitted to operate for the perpetuation of irresponsible government, the escape of just obligations or the insidious allegation of dominating ambitions on the part of the United States."

International Law and Peace[1]

In common with the other civilized nations the United States recognizes international law as a part of its law. International law is a vast complex of rules and regulations governing the relations of nations in time of peace and in time of war — rules which are to be found in treaties and agreements, the statutes of various countries, the doctrines laid down by high judicial tribunals, in the principles enunciated by authoritative writers, and finally in the recognized practices of nations.

It is a mistake to regard international law as merely a body of amiable theories that may be broken at will by any nation. It is true that there is no world executive authority or judicial tribunal to enforce the practices of international law by punishing offending nations; and this has led many legists to deny even the name of "law" to the rules governing the intercourse of nations, on the ground that they have no *sanction* beyond the mere voluntary approval of individual nations. This view overlooks the fact that there are other sanctions than those of mere material force and that the very interests and necessities of each nation compel it to observe certain well-defined rules in the conduct of its business with other countries. The domestic law of every nation is constantly being violated, notwithstanding the sanction of force upon which it rests. For instance, American citizens often violate with impunity the customs laws in spite of the penalties which may be imposed for the offence; but the United States would not think of seizing arbitrarily a British merchant vessel

[1] It is too early to estimate the effect of the World War (1914–18) and the League of Nations upon international law. Efforts to place international intercourse upon a legal foundation certainly have not in any way diminished; but many of the old rules of war and peace are certainly obsolete.

in the harbor of New York and thus run the risk not only of serious commercial loss, but also of a costly war.

It is impossible, of course, in a treatise of this character to go into the content of international law at any length, but some notion of the principles which it embodies seems necessary to give definiteness and reality to the statement that international law is not a collection of theories and moral principles, but a substantial body of rules and regulations applicable to the conduct of intercourse between states. In international law we find laid down the principles defining what may be regarded as an independent state (which is the "person" or "subject" of international law); the fundamental rights and duties of states; the methods by which new states come into existence and are recognized; the character of the property of a state; methods of acquiring property; the territorial waters of a state; the privileges and immunities of diplomatic agents; the jurisdiction of a state over aliens within its borders; piracy; grounds and conditions upon which one state may interfere in the affairs of other states; principles of expatriation and naturalization; the making and abrogating of treaties; arbitration, mediation, and acts mitigating the rigors of war. These matters are treated under that branch of international law known as the law of peace.

Even the practices of war are regulated by well-accepted rules. The law of war, for example, governs such topics as the declaration of war, non-combatants, privateering, the prisoners of war and their treatment, the instruments of war and bombardment of towns, and the use of explosives; the effect of war upon the property of belligerent states, their subjects and the subjects of neutral states; the effect of military occupation upon property on land; the rights and duties of neutrals; contraband of war; blockade; right of search; and prize courts.

On all of these topics of international law definite information is to be secured from decisions of courts, treaties, statutes, official documents, and authoritative writers; and while a variety of opinions may be entertained by the legists of different nations, it must be remembered that lawyers and courts are by no means always agreed as to what the domestic law is on any particular point.[1]

[1] The student will do well to refer at this point to the monumental collection of material on international law prepared by Professor J. B. Moore,

Strictly speaking, international law is not a body of world-law, but a body of rules which is recognized by each civilized power as a part of its domestic law. "International law," said Mr. Justice Gray of the Supreme Court of the United States, in an opinion,[1] "is part of our law,[2] and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as an evidence of these to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

An international tribunal independent of the governments of particular states, enforcing principles of international law, and adjudicating disputes between different nations, was long a dream of those working for the establishment of world peace. Moreover, on many important occasions during the nineteenth century, the United States resorted to the practice of arbitration for the purpose of adjusting controversies with foreign countries. The first treaty signed with Great Britain in 1794 after the conclusion of peace provided for three tribunals or commissions to arbitrate certain questions which threatened to bring on a new conflict between the two countries; and many irritating controversies over the boundaries between the United States and Canada and the fishing rights of the respective countries have been adjusted by way of arbitration. The success which accompanied the settlement of controversies with Canada was decidedly encouraging to the friends of arbitration.

International Law Digest (8 vols., Government Printing Office). Even though making no attempt to go into the technicalities of these subjects, the teacher should impress upon the student the notion that international law is not merely a body of theories elaborated by the enthusiasts for international peace.

[1] 175 U. S. R., 677.

[2] The Constitution recognizes the law of nations by authorizing Congress to define offences against it.

The most famous case of arbitration in American history was that of "the Alabama Claims," which grew out of depredations committed upon American merchant vessels during the Civil War by ships which Great Britain allowed to be constructed in British ports which were used as a base of operations for the Confederate government. After a good deal of angry dispute, the two countries agreed by a treaty of 1871 to submit the whole matter to a tribunal composed of one citizen of the United States, one British subject, and three other members, named by the King of Italy, the President of Switzerland, and the Emperor of Brazil, respectively. This tribunal met in Geneva, and after prolonged sessions it came to the conclusion that with regard to certain vessels the British government had violated or neglected its duties as a neutral power; and an award of damages aggregating $15,500,000 was rendered in favor of the United States, and paid, in spite of the protest of the British member of the tribunal, and some feeling of resentment in Great Britain.[1]

The United States, therefore, had had a long experience in the peaceful adjustment of controversies, when it was invited, in 1898, in common with the other powers of the world, by the Tsar Nicholas II, of Russia, to participate in a conference at the Hague for the purpose of discussing the subject of reducing excessive armaments. The first Hague conference, which met in 1899, was unable to come to an agreement on the main question, and merely recommended the nations to examine the possibility of limiting armed forces by land and sea. The powers however, agreed to recognize the right of any nation, without prejudice, to offer its services to countries at war with one another, as an aid in friendly mediation. The first conference, furthermore, recommended parties unable to come to an agreement by negotiation to submit matters not involving national honor or vital interests to an investigation by an impartial com-

[1] In addition to resorting to arbitration in a large number of cases, the government of the United States has been instrumental in preventing war, and in restoring peace, by offering to countries on the eve of war or already at war its services in settling the dispute or in terminating the armed conflict. For example, in 1871, it tendered its good offices in a war between Spain and certain South American republics, and secured an agreement to an armistice which eventually resulted in a treaty of peace. In 1905 President Roosevelt was instrumental in bringing the Russo-Japanese war to a close.

mission of inquiry, to be instituted by an arrangement between the parties to the controversy. Finally, the conference agreed upon the establishment of a permanent court of arbitration to consist of not more than four persons from each country, selected by the respective nations from among their citizens, "of recognized competence in international law, enjoying the highest moral reputation." Whenever two powers are in a controversy, they may submit the issue to a tribunal selected from this long list of eminent jurists.

The results of the first Hague conference led President Roosevelt, in 1904, to propose a second meeting of the powers; but he yielded the honor of issuing the call to Nicholas II. The conference (1907) could not agree upon any plan for reducing military and naval expenditures or establishing general compulsory arbitration. It devoted itself largely to the regulation of the actual conduct of war, the treatment of prisoners, the bombardment of towns, the rights of neutrals, etc.

Among the objects of the United States in entering the war against Germany, President Wilson placed the establishment of "a secure and lasting peace." The means designed to accomplish this result he declared to be "a League of Nations formed under covenants that will be efficacious." In the treaty signed at Versailles on June 28, 1919, there was included as Part I "the Covenant of the League of Nations." This section provided that the League should consist of: (1) the powers arrayed against Germany, (2) the powers that had been neutral, if they saw fit to join, (3) and any other fully self-governing state, dominion, or colony on approval of a two-thirds vote in the Assembly.

The organs of government set up by the covenant were: (1) a council consisting of the representatives of the principal Allied and Associated Powers, together with four other members selected by the Assembly, and (2) the Assembly to consist of representatives of all the nations that are actually members of the League. The seat of government was fixed at Geneva. Any war or threat of war was declared to be a concern of the whole League and provisions were made for submitting disputes to the League for settlement. The United States Senate rejected the treaty and attempts made to reach a compromise were without avail.

CHAPTER XVII

NATIONAL DEFENCE

Land Forces. Historically speaking, the United States has relied upon four main forces for military purposes:

1. The army of the United States, commonly known as the regular or standing army, organized under acts of Congress, composed of a small body of men, numbering less than 100,000 in 1914. This branch of service is recruited by volunteers for a term of years. The maximum number of men and officers, the term of service, the ranks and grades, the strength of the regiments and other divisions are determined by law. For the purposes of defence, the army is distributed among several departments and divisions into which the territory of the United States is divided. On April 1, 1917, the total number of men in the army of the United States was 190,000.

2. Special volunteers, men who enter the military service of the United States for specified terms and services. For example, on April 15, 1861, Lincoln called upon the governors of the states for seventy-five thousand volunteers from the ranks of the militia to serve for three months in enforcing federal law against combinations too powerful to be overcome by judicial process or the powers vested in federal marshals.

3. The militia or national guard, consisting in each state of a small number of men who volunteer and give a small amount of time to training and preparation. This third branch of defence is established under acts of Congress under the provisions of the Constitution, which authorize it to organize, arm, and discipline the militia, govern such parts of it as may be employed in the federal service, and call it into the service to execute the laws of the union, suppress insurrections, and repel invasions. Under this power Congress passed in 1903 and 1908 two acts designed to bring all able-bodied men into the service of their country and to make the organized militia of the several states

and territories and the District of Columbia more immediately serviceable in time of need. Under these laws all able-bodied male citizens of the country between the ages of eighteen and forty-five were declared to be members of the militia and divided into two classes: (1) the organized militia, known as the national guard, and (2) the reserve militia composed of those who had not actually entered the militia service as volunteers. Additional provisions were embodied in the National Defence Act of 1916.

The militia force is always at the disposal of the federal government in case of invasion, war with a foreign nation, or rebellion against the authority of the United States. Whenever the President is unable, with the regular force at his command, to execute the laws of the Union, he may call out such number of the militia of any state or territory or the District of Columbia as he may deem necessary to meet the situation. He does this under authority of an act of Congress.

4. Drafted men. For example, on March 3, 1863, Congress enacted the Civil War draft law enrolling in the national forces all able-bodied male citizens, and persons of foreign birth who had declared their intention of becoming citizens, between the ages of twenty and forty-five, from among whom were selected by lot certain quotas for military service. Persons who found a substitute or paid $300 into the War Office were exempted from liability. In the war on the Central Empires (1917–18) the principle of the selective draft was again applied in a new form.

The Navy. Under the Constitution Congress has full power to provide and maintain a navy. Previous to the War with Spain in 1898, the navy did not enlist as much public interest as the army. During the War of 1812 American sailors gave a good account of themselves in many famous sea fights, but the Mexican and Civil wars were mainly land wars, although it must not be forgotten that it was the blockade of southern ports as well as the battles of the Grand Army of the Republic that at last brought defeat to the Southern Confederacy. Inasmuch as nearly all of our territory was compact and on the North American continent, it was thought that good coast defences and a few battleships would suffice. The acquisition of the Philippines and Porto Rico, however, changed all that and made it clear that in case of a war with a European or Asiatic power it

would be necessary to have a large navy to defend distant possessions. After the Spanish War American naval appropriations began to increase rapidly. By 1912 the United States stood next to Great Britain in the amount spent for defence upon the seas. The destruction of Germany's navy in the Great War left the United States the second great naval power of the world.

The Great War and the Revolution in National Defense

The titanic conflict which broke out in Europe in 1914 gave an entirely new aspect to war and national defence. In previous wars, the armies in the field and the number of civilians employed in making munitions and supplies for them included only a part — usually a small part — of the total populations concerned. In the World War whole nations were involved. It was estimated that from three to twenty adults were required to keep a single man on the firing line. If we take the most conservative figure and recall that the grand total of men in the United States army (including the marines) at the time of greatest strength, November 11, 1918, the day of the armistice, was 3,703,273, we see what a modern war involves in terms of civilian strength to support it. Modern war means practically the whole nation in arms or at work in support of the armed forces on land and sea. As President Wilson said: "In the sense in which we have been wont to think of armies there are no armies in this struggle. There are entire nations armed. . . . It is not an army that we must shape and train for war; it is a nation." American national defence can best be understood therefore in terms of the principal pieces of legislation enacted and the measures taken to win the war against Germany. They were as follows:

1. The Selective Draft Laws. By an act approved on May 8, 1917, it was provided that the great national army should be impartially chosen from among males between the ages of 21 and 31 inclusive. The President was authorized to apply as necessary the terms of the selective draft, based on the liability of all male citizens and male persons (not alien enemies), who had declared their intention to become citizens, between the ages indicated. Quotas for the several states were to be determined according to population. Federal and state officers, ministers, and a few others were exempted. All persons liable to service

were registered and from them were selected as needed the men for the army. In August, 1918, Congress by law extended the term of years to include men between 18 and 45. The new registration was made on September 12, 1918, and similar principles of selection were applied.

2. The Insurance Act. By a law enacted October 6, 1917, Congress made large appropriations for: (1) military and naval allowances to be paid under appropriate regulations to the families of soldiers and sailors and those relying in whole or in part upon their earnings, (2) compensation for enlisted men or their families in case of death or disability, and (3) a relatively inexpensive system of insurance for the benefit of soldiers and sailors, such insurance payments to be in addition, of course, to the regular allowances made by the government.

3. Liberty Loan Laws. During the course of the war the government floated four great national loans. The first loan under the law of April 24, 1917, had 4,500,000 subscribers and the fourth loan in October, 1918, over 20,000,000 subscribers. The popularity of the loans was enhanced by the issuance of bonds of denominations as small as $50. In order that smaller amounts might be subscribed War Savings Stamps were devised.

4. Measures of Taxation. After the declaration of war, the cry was raised that "wealth as well as men should be conscripted," and in some quarters it was urged that the entire cost of war should be laid upon large fortunes and incomes. Congress adopted a middle course and provided enormous revenues from: (1) progressive income taxes, (2) progressive inheritance taxes, and (3) excess profits taxes upon all incorporations and partnerships. "This," says Professor Seligman, "is the high-water mark thus far reached in the history of taxation. Never before in the annals of civilization has an attempt been made to take as much as two thirds of a man's income by taxation."

5. National Food and Fuel Control Law, August 10, 1917. Among other things this law forbade: (1) wilful destroying of the necessaries of life for the purpose of enhancing prices; (2) restricting supplies or knowingly committing waste; (3) attempting to monopolize supplies or to limit the facilities for producing or transporting supplies; (4) limiting the manufacture of necessities in order to exact excessive prices. The President was authorized: (1) to requisition food and other supplies for the

support of the army and navy; (2) to prescribe regulations governing marketing; (3) to fix the price of wheat; (4) to take over and operate if necessary, factories, mines, packing houses, and other plants; (5) to fix the prices of supplies requisitioned for military purposes; and (6) to control the prices of supplies of coal and coke. In order to make possible further control the President was empowered to license the importation, manufacture, storage, mining, or distribution of any necessaries with a view to bringing all such operations under federal scrutiny.

6. The Railways and Means of Communication. By a proclamation of December 28, 1917, the President placed the railways under government control and operation, and the Secretary of the Treasury was made director-general. In March, 1918, Congress passed the railroad control bill, providing the terms and conditions under which the government was to operate the railroads for the period of the war and not to exceed twenty-one months after the proclamation of peace. In the summer of the same year, the express, telephone, and telegraph systems were taken over by the government. Coastwise and high-seas shipping was likewise placed entirely at the disposition of the government, and an Emergency Fleet Corporation was created to mobilize the resources of the country to build ships.

7. The Espionage and Sedition Acts. An espionage law, approved June 15, 1917, provided heavy penalties for: (1) those who attempted to communicate to any foreign nation any information to the injury of the United States; (2) those who wilfully made or conveyed false statements with the intent to interfere with the operations of American forces or promote the success of the enemies of the United States; (3) those who wilfully attempted to cause disloyalty, insubordination, mutiny, or refusal of duty among the military and naval forces of the United States. The Sedition Act, as an amendment to the Espionage Act approved May 16, 1918, imposed a heavy fine or imprisonment upon persons "who use abusive language about the Government or institutions of the country, who advocate or incite any curtailment in the production of war materials, and who by word or act favor the cause of an enemy country." The Postmaster-General was empowered to close the mails to any one who in his belief was using the postal service in violation of the Sedition Act. The Sabotage Act of April 20, 1918, laid

penalties upon those who wilfully destroyed war materials or interfered with the production of war materials.

In pursuance to legislation which we have just reviewed the following important agencies were created to carry on the administration of the functions necessary to keep the country on a war footing and to support adequately our land and naval forces.

The War Industries Board. — This board was created in July, 1917. It was really a planning and controlling board for industries, empowered to bring all of them under government control, to speed up the production of necessary materials, to distribute the demands for supplies from all the war divisions to the industries best fitted to meet them expeditiously, and to coördinate the work of all to prevent duplication, waste and delay. It was the great centralizing and coöperating agency standing between the government and industries, controlling the latter and organizing them to serve the military needs of the former.

The Priorities Board or Division, in the War Industries Board, charged with the duty of guiding industries and governmental agencies in "the production, supply, and distribution of raw materials, finished products, electrical energy, fuel, and transportation," and of laying down rules for giving priority or preference to those materials and activities necessary to meet the war needs of the government in the order of their importance.

United States Railway Administration, under the direction of the Secretary of the Treasury. Supplemented by an Advisory Board. In charge of the administration of the railways taken over by the federal government.

The Emergency Fleet Corporation. — Created for the purpose of drawing together and securing the coöperation of all the shipbuilding interests in the country and creating new shipbuilding forces with a view to the immediate enlargement of the fighting forces on the sea and merchant marine of the United States. The ravages of the submarine and the necessity for an immense tonnage to transport soldiers and then supply them with materials led the government to develop this special agency, which was in effect an extension of the National Shipping Board established before the entrance of the United States into the war.

The Food Administration, created to enforce the provisions of the law of August 10, 1917, and additional rules laid down from time to time in furtherance of the principles therein contained. Federal food administrators were also established in every state.

The Fuel Administration, created to enforce the fuel provisions of the law of August 10, 1917, and rules and regulations relative to the

mining, distribution, and price of coal, for war, industrial, and ordinary purposes.

The Aircraft Board, independent organization, supervised (in accordance with requirements of the respective departments) the purchase, production, and manufacture of aircraft and aircraft materials.

National Advisory Committee for Aëronautics, created under act of Congress of March 3, 1915, to direct experimentation and research into the problems of flight and their solution.

The War Labor Board was created in April, 1918, for the purpose of adjusting, by mediation and conciliation, disputes arising between employers and employees in war industries. "In case of an industrial dispute, a local committee or board is first appointed to arbitrate it; failing settlement by the local board, parties to the controversy are summoned before the National Board itself; if the Board members are then unable to agree upon a decision, an umpire is appointed, either unanimously by the Board, or, if the members disagree, then by lot from a list of ten persons nominated for the purpose by the President of the United States. Beyond the decision of this umpire no compulsion is incorporated in the original statement of the Board's powers. The President has, however, commandeered factories of recalcitrant employers, and threatened with exclusion from industry and withdrawal of immunity from the draft striking employees who refuse to return to work after the governmental award. The power of the President and the pressure of public opinion in favor of uninterrupted production make this national experiment in arbitration practically compulsory.

"The Board bases its decisions on the following principles: Workers and employers have the right to organize and to bargain collectively through chosen representatives. Employers are not to discharge workers for membership in trade unions. Workers may not use coercive measures of any kind to induce persons to join their organization. Where the union shop now exists it shall continue to do so, and in establishments where unionists and non-unionists work together and the employer meets only with employees or representatives engaged in his own establishment, the continuance of such conditions shall not be deemed a grievance. This declaration, however, is not intended in any manner to deny the right or discourage the attempt to form labor unions. Safeguards to health shall not be relaxed. Equal pay is allowed for equal work. The basic eight-hour day is recognized as applying in all cases in which the existing law requires it. The right of all workers, including common laborers, to a living wage is declared."[1]

[1] *The Nation*, October 26, 1918.

War Labor Policies Board, in the Department of Labor, dealt with principles involved in the determination of wages, hours, conditions of labor, government labor policies, and the distribution of labor.

United States Employment Service, in the Department of Labor, managed employment offices throughout the country and aided in the distribution of labor, especially to war industries.

Bureau of Housing, in the Department of Labor, in charge of providing suitable housing conditions in war industries and shipbuilding centers.

The War Trade Board, charged with the functions: (1) of conserving for the United States and the Allies the commodities necessary to their economic life and the prosecution of the war, through the control of trade with neutrals as well as the Allied powers and (2) of controlling American merchants in their transactions with foreigners by the publication of the names of enemy corporations or those allied to enemy interests. For example, an agreement was concluded with Switzerland allotting her a certain amount of grain in return for assurances relative to certain trading with the enemy of the part of Swiss citizens.

Board for Vocational Education, created by act approved June 27, 1918, and authorized to plan and execute plans for the training and education of disabled soldiers and sailors so as to fit them for remunerative and congenial employment in civilian life. "Every effort will be made to assist the disabled man toward that occupation in which he is most interested and for which, because of his aptitude and experience on the one hand and his handicap on the other hand, he is best suited." Funds were provided to support the student in training, to assist him in securing desirable employment, and to safeguard his interests after he secured regular employment.

Bureau of War Risk Insurance, in the Treasury Department, with branches throughout the country, charged with the function of executing the provisions of the law (see above, p. 345) relative to allotments to the families of soldiers and sailors and to war risk insurance.

The Council of National Defence, created under act of Congress, approved August 29, 1916, and composed of the six cabinet officers: the Secretaries of War, Navy, Interior, Agriculture, Commerce, and Labor. Its functions were to investigate and to advise Congress and the President as to the best ways in which to mobilize the industrial, transportation, and agricultural interests of the country for immediate concentration and use in national defence. It embraced innumerable committees and subcommittees, which acted in an advisory and consulting relation to the war agencies of the government. It endeavored to assist state committees in the prosecution of their work. Much of the planning work of the Council was taken over by the executive boards herein described.

The Censorship Board, created under the Trading with the Enemy Act, designed to control mail, telegrams, messages, and other communications to neutral countries, which might be intended for enemy countries.

The Committee on Public Information, created to serve as a channel of communication between the government and the people relative to war aims, activities, and accomplishments, and to disseminate in neutral and Allied countries information about the ideals and war aims of the United States.

American National Red Cross, under the presidency of the President of the United States, a relief organization with government sanction assisting the army and the navy in caring for the wounded and suffering.

Alien Property Custodian, empowered to take possession of, manage, and sell the property of enemy aliens and to act as custodian for the funds accumulated.

War Finance Corporation, created by act of Congress signed by the President on April 5, 1918, and supplied with an immense capital for the purpose of aiding banks that made advances to essential war industries, helping savings banks which might be in distress through the competition of federal bonds or otherwise, and loaning money to war enterprises.

Capital Issues Committee, connected with the War Finance Corporation, charged with the duty of supervising the issues of bonds by states, cities, counties, and private corporations with a view to keeping their expenditures down to the minimum, thus securing to the federal government money and materials and labor which otherwise might go to local improvements or business extensions not necessary to winning the war.

State War Legislation[1]

While the Congress of the United States was providing the national legislation in support of the war, the legislatures of the several states were likewise very active in the passage of laws designed to place the country in a condition of preparedness. The volume of legislation covered a wide range of subjects.

State Councils of Defence. — A number of states passed laws creating state councils of defence, consisting of from 7 to 50 members, appointed by the governor, and representing the manufacturing interests, labor, agriculture, stock raising, the Red Cross and relief societies, the physicians, bankers, railroads, engineers, the women and the citizens gen-

[1] J. A. Lapp, *American Political Science Review,* February, 1918.

erally. The board of public works in West Virginia acts as the state council of defence. Appropriations ranging from $50,000 to $750,000 were made to carry on the work. In Indiana a state council of defence was created by executive action after the adjournment of the legislature of 1917.

Military Census. — Half a dozen states, including Iowa and New York, provided for the taking of a military census to ascertain the resources of the state in men and materials.

Militia Laws. — The federalization of the national guard left the states without adequate military protection, and home guards were therefore created, consisting of able-bodied male persons not subject to conscription, whose term of service was for the duration of the war. For the purpose of guaranteeing state-wide security within its borders, New York also created a state police force. The City of New York was authorized to employ emergency police and temporary firemen. In Connecticut the governor was authorized to appoint a military emergency board of three members to perfect and maintain a body of armed troops as a constabulary guard, to be recruited from the unorganized militia of the state; and any town at any annual or special town meeting could appropriate money for the maintenance of military organizations. Many other states took similar precautionary measures.

Registration of Aliens. — A few states, including Connecticut, Florida, and Maine, enacted laws providing for the registration of aliens within a fixed period, usually twenty-four hours after the promulgation of the governor's proclamation, or within twenty-four hours after the alien entered the state. Hotels, boarding houses, and lodging houses were required to supply information as to the residence of aliens therein.

Military Instruction in Schools. — Louisiana passed a law requiring the teaching of military science to all boys above the eighth grade. Maryland and New Jersey appointed commissions to investigate its practicability and methods. New York created a military training commission, consisting of the major-general commanding the national guard, one person appointed by the regents of the state university, and one person appointed by the governor.

Desecration of the Flag. — Several states enacted new or amended old laws prohibiting the desecration, mutilation, or misuse of the national flag. Several states require the flag to be displayed on all schoolhouses while school is in session.

Food Conservation. — The subject of food production, distribution, and conservation received marked attention and various expedients were adopted to achieve the desired end. For example, New York created two commissions to deal with the question of food production, food distribution, and food conservation, and the authority of

these commissions was extended to comprehend fuel and other necessaries of life. Virginia established a division of markets in the department of agriculture and immigration; West Virginia created a bureau of markets and enacted a law prohibiting speculation for the purpose of cornering the market and controlling the price of foodstuffs, fuel, and other necessities of life; Washington created the office of director of farm markets and provided for the production and marketing of farm products; Wyoming provided for the exemption of food from taxation to the value of $100.

Definition of Crimes. — The existence of a state of war led to the definition of new offences against the public peace and the dignity of the state and the redefinition of older offences to secure the loyalty of citizens and provide for the protection of property and human life. Iowa declared the exciting of sedition or insurrection by writing, speaking, or other means a felony and advocating the subversion or destruction of the federal or state government by force, and being a member of or attending a meeting or council of any treasonable organization, society, or order, a misdemeanor. The destruction of armories, gas, electric, telegraph, or telephone plants, sources of food or water supply, dams, reservoirs, canals, trenches, machinery, bridges, docks, quays, fortifications, warehouses, railroads, or other works necessary to the successful prosecution of the war were constituted crimes in Illinois, Maine, Maryland, Rhode Island, and Vermont.

Aid to Dependents. — Prior to the passage of the military insurance act the question of the necessary financial assistance to indigent dependents of enlisted or drafted men was of first-rate importance, and several states enacted laws which afforded partial and temporary relief. In New York, for instance, any county, city, town, or village was authorized to provide financial aid for the dependents of enlisted men, and an agency known as the New York patriotic fund was permitted to incorporate to furnish aid to the dependents of recruits.

Schools. — In New York children were released from school attendance without loss of credit or standing if they were engaged in farm work. In Arizona the state board of education was authorized to close all educational institutions during the continuance of the war if such action was deemed essential. In Connecticut high school pupils over fourteen years of age who volunteered and were accepted for farm work were permitted to reënter school without loss of standing if they maintained the prescribed food standards.

Moratorium and Stay Laws. — A few states provided moratorium and stay laws whereby suits begun against enlisted men during the war were to be suspended until six months after the war was concluded, and by virtue of which debts due could not be collected during the continuance of the war. The amount of property owned by en-

listed persons and exempted from attachment was increased. Laws of this kind were enacted by Maine, Maryland, and Oregon.

Labor Laws. — Vermont authorized the commissioner of industries, with the approval of the governor, to suspend the operation of the laws relating to the hours of employment of women and children, during the continuance of the war.

Involuntary Labor. — Maryland and West Virginia provided that the governor might order all able-bodied male persons between the ages of sixteen and sixty, not otherwise regularly employed, to be put to work on government contracts.

Discrimination against Soldiers. — Laws designed to prohibit discrimination against soldiers and sailors in theatres, skating rinks, public conveyances, inns, hotels, and other public places were enacted by Maine and Texas.

It is clear from even this incomplete review of America's legislative preparation for war, that no power over the lives or property of citizens deemed necessary for the successful prosecution of the armed conflict was withheld from the duly constituted public authorities. The farmer's wheat, the housewife's sugar, coal at the mines, labor in the factories, ships at the wharves and on the high seas, trade with friendly countries, the vast national railway system, the banks and stores, private riches, lands and houses — all were mobilized and laid under whatever obligations the requirements of waging war made imperative. Never before were labor and capital, land and natural resources so completely subjected to governmental authority in a common enterprise.

Military and Naval Administration

On the side of the civil administration, the army and navy are under the control of the Department of War and the Department of the Navy, subject always, of course, to the President of the United States, who in time of peace as well as war is the commander-in-chief of our armed forces. The heads of these departments are usually civilians without practical military or naval experience.

The Secretary of War, appointed by the President and Senate, directs the military establishments of the United States; he has charge of the fortifications, river and harbor improvements, and bridges; he supervises the administration of the Philippine

Islands, the Panama Canal, and the government of the Canal Zone. All matters relating to national defence, sea-coast fortifications, the improvement in the navigable waters of the United States, military education at West Point, and military education of the army, are under his control. He must subject to examination all estimates of appropriations for the expenses of his department and the entire military establishment, including the purchase of military supplies. He must also scrutinize all expenditures for the support, transportation, and maintenance of the army, and, in addition, all other expenditures which may be placed in his charge.

As a connecting link between the civil administration and the army in the field, Congress created, by an act approved February 14, 1903, a General Staff, to be composed of officers detailed from the army at large under the rules prescribed by the President. This staff includes not only general officers (major-general as chief) but also colonels, majors, and captains, thus giving the directing staff points of contact with the rank and file of the army. To keep this body in constant touch with the practical problems of warfare, it is provided that officers detailed to the General Staff may serve in that capacity for only four years at most; and on returning to the army they must remain there at least two years before they can be detailed again, except in time of emergency. The head of the staff is the Chief of the Staff, who acts under the direction of the President and the Secretary of War.

It is the duty of the General Staff to prepare plans for national defence and for the mobilization of the national forces in time of war; to investigate and report upon all questions relating to the efficiency of the army and its state of preparation; to render professional aid to the Secretary of War and to the general officers and their superior commanders; and perform such other military duties, not otherwise assigned by law, as the President may from time to time prescribe. The office of the Chief of Staff constitutes, for administrative purposes, a supervising military bureau in the War Department.

The Navy Department, created in 1798, is in charge of the Secretary of the Navy, appointed by the President and Senate. He is authorized to perform such duties as the President may assign him, and to superintend the construction, manning, armament, equipment, and employment of vessels of war. He

is immediately aided by an assistant secretary, and by a chief clerk who has charge of the records and correspondence, and performs other routine duties.

To assist in securing and preparing competent officers for the army and navy, the United States maintains two institutions of higher learning: the Military Academy at West Point and the Naval Academy at Annapolis. The course of instruction at both institutions is principally mathematical and professional, but it embraces also a large range of additional subjects. The full quota of cadets at West Point is maintained by assigning two cadets to each United States Senator and two to each congressional district and territory, and a number designated by the President (two by the Vice-President) including men from the regular army and the militia. As vacancies occur, appointments are made, on the nomination of the Senators, Representatives, Delegates, and the President respectively; but these nominees must pass regular examinations testing their preparation for the course of instruction. Midshipmen for the Naval Academy are secured by assigning five to each Senator, Representative, and Delegate in Congress, two to the District of Columbia, and fifteen to the President. Graduates from these institutions are given special advantages on entering into active service.

Army and navy officers are appointed by the President and Senate — subject to the constitutional limitation reserving the appointment of militia officers to the states. In time of war it has been impossible to secure enough army officers from West Point and the government has been compelled to call men from civil life or from the ranks to fill high places. It has been provided by law that in time of peace army and navy officers may be removed only by court-martial; but in time of war the President may remove summarily.

The actual direction of war is obviously difficult to describe. The power of direction is, of course, vested in the President; but the extent to which he may use it to control not only the general but the minute movements of the army and navy depends upon many things: the character of the theatre of war, the facility of communication, the confidence of the President in his own military ability, and the regard which he has for the abilities of the officers immediately under his command. He could, of course, take the field himself if he saw fit.

During the Spanish-American War, President McKinley, the Secretary of War, and the Secretary of the Navy sat together in what is known as the War Room at the White House, which was connected with the scenes of action by the most modern means of communication; and from time to time they sent out general instructions, and detailed orders to commanding officers.

We may say, therefore, that the President and his immediate advisers in Washington sketch the general plans of campaign; supervise their execution; make changes and issue new directions from time to time, always coöperating with the officers at the front, trusting more or less to their use of discretion amid the exigencies of battle.

The Pension System

No country in the world has been more liberal in the provision of pensions for soldiers and sailors and those dependent upon them than the United States. A pension system was established as early as 1776. Following every war there is a new pension law or rather a series of pension laws, making provisions for those who have served their country; and payments for previous services are constantly being made more liberal. In 1905, the roll of pensioners reached 1,004,196, the largest in the history of our country; in 1919 the number stood at 624,000. The total amount actually disbursed in pensions for 1919 was $222,000,000 in round numbers. By acts of October 6, 1917, and June 10, 1918, special provisions were made for the soldiers and sailors of the World War.

It is not only the soldiers who have seen actual service that are pensioned. Many widows, children under the age of sixteen years, and helpless minors are provided for, and state and national homes are established for the disabled and indigent. It was not until November 11, 1906, that the last surviving widow pensioner of the Revolutionary War died and two daughters of soldiers in that war were still on the roll in 1908. The last pensioned soldier of the War of 1812 died in 1905, but the roll of that war contained in 1908 over 400 widows. On June 30, 1919, there were 271,000 survivors of the Civil War on the pension roll.

The administration of the pensions is in charge of a commissioner in the Department of the Interior.

The Cost of War

During the fiscal year 1908, the United States spent for army, navy, and fortifications no less than $204,122,855.57, or 36.5 per cent of the total revenue, exclusive of postal receipts (because the revenues and expenditures in that department constitute a balanced account). During the same year also we spent $180,678,204, or about 31 per cent of our total revenue for pensions, interest on war debt, and other charges incurred by past wars. In the daily statement issued by the Treasury Department on April 30, 1909, we find an expenditure of 41 per cent of all the revenues of the fiscal year up to that day for the army, navy, and fortifications — that is, in preparation for war — and 31 per cent of all the revenue on account of past wars, making a total expenditure of 72 per cent of all the federal revenues thus collected, either on account of past wars or in preparation for war.

There was at the same time a strong tendency to increase military expenditures. Under the second administration of President Roosevelt, the per capita appropriation for the army was $3.66, — more than two and a half times the amount appropriated under Mr. Cleveland's administration. Under Mr. Roosevelt, the naval appropriations, measured in relation to the population, were three times as great as under Mr. Cleveland; and at the same time there was an increase of 50 per cent in the expenditure for fortifications.

The increase in appropriations for military purposes was especially rapid after the Spanish War. The average annual army appropriations for the eight years just preceding that war amounted to $24,000,000; for each of the eight years ending in the fiscal year of 1910, the average amount totals $83,000,000. During this same period the annual average appropriations for the navy rose from $27,500,000 to more than $102,400,000.

The climax was, of course, reached during the War against Germany. The net cost of that conflict to the United States is placed at $22,625,252,843, exclusive of over $9,000,000,000 advanced in the form of loans to the Allied forces. The per capita interest on the national debt in 1918 exceeded the per capita army appropriations ten years before.

CHAPTER XVIII

TAXATION AND FINANCE

The Power of Congress to Tax[1]

UNDER the Constitution Congress has a general power to lay and collect taxes, duties, imposts, and excises. Subject to certain rules which we shall consider later, there is no limit on the *amount* of taxes Congress may lay. The Chief Justice of the Supreme Court, in speaking of a tax which was so excessive as to impair the value of the franchises of state banks, said that it was not within the province of the judiciary to prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers.[2] If the power to tax is exercised oppressively, he declared, the remedy for the wrong rests with the people who choose the legislature.

1. Some of the restrictions on the exercise of this taxing power are expressly laid down in the Constitution. It is provided in that instrument that all duties, imposts, and excises shall be uniform throughout the United States; and under an interpretation of the Supreme Court, a uniform tax is one which falls with the same weight upon the same object wherever found within the United States. For example, Congress once laid a duty of fifty cents on every passenger coming from foreign countries into the United States, and this tax was held to be uniform, although it was levied principally at a few ports. Again, an inheritance tax is uniform[3] when it is imposed equally upon all inheritances of the same amount and character, though it may so happen that the taxable inheritances may occur in only a few states of the Union during the existence of the law.

2. The second express limitation on the taxing power of Congress is that direct taxes (except income taxes) shall be apportioned among the states according to their respective numbers.[4]

[1] For the social implications of this power, see *Readings*, pp. 283 and 331.

[2] Veazie Bank *v.* Fenno, 8 Wallace, 533.

[3] *Readings*, p. 323.

[4] For an example, *Readings*, p. 327.

3. The Constitution also provides that Congress shall not lay a duty or tax on articles exported from any state, and that, in the regulation of commerce and revenue, no preference shall be given to the ports of one state over those of another. To prevent discrimination between states, it is further stipulated that vessels bound to or from one state shall not be obliged to enter, clear, or pay duties in the ports of another.

4. In addition to the express limitations [1] laid down in the Constitution, there is an important implied restriction on the taxing power. Congress cannot tax the instrumentalities or the property of any state.[2] This doctrine has been applied in a number of cases. For example, during the Civil War, Congress levied a tax on the gains, profits, and income of every person residing in the United States ; a judge in Massachusetts refused to pay the tax upon his income which was derived from the commonwealth, and the Supreme Court of the United States upheld him in his refusal, declaring that the federal government was thus taxing an instrumentality of a state.

Broadly speaking, there are two forms of taxes in the United States, direct and indirect; and it is always necessary to decide into which of these two categories any tax about to be laid by Congress falls, and, therefore, whether the rule of apportionment according to population or the rule of uniformity shall apply.

I. During the early years of the federal government it was generally understood that there were two kinds of direct taxes — a capitation or poll-tax and a tax on land.[3] It was held by the Supreme Court in 1895 that taxes upon income from real and personal property were likewise direct, and therefore constitu-

[1] The taxing power of the federal government must be exercised according to due process of law. See above, p. 151.

[2] See McCulloch *v.* Maryland, 4 Wheaton, 316.

[3] In practice the federal government has imposed, as avowedly direct, taxes on real estate and slaves. For example, in 1798, a direct tax was imposed on real estate, and a capitation tax was laid on slaves; and in a few other instances this precedent was followed. In 1861, under the necessity of raising funds to carry on the Civil War, the federal government voted a tax of twenty million dollars to fall on lands and improvements, and divided this amount among the states in proportion to their respective populations as shown by the census. Some of the states assumed the entire quota allotted to them, and after the war the amounts collected were refunded to the states. For this law, see *Readings*, p. 327.

tional only when apportioned among the states according to their populations.[1] On account of the difficulties of assessing direct taxes and apportioning them among the states, and the resulting injustice, the constitutional limitation is almost a prohibition. However, in 1913, after a long agitation over the matter, a constitutional amendment was adopted authorizing Congress to lay taxes upon private incomes from all sources without reference to any census or enumeration.

II. Indirect taxes, which are subject only to the rule of uniformity, may be taken to include excise taxes upon commodities, such as whiskey and tobacco; customs duties imposed upon goods coming into the United States from other countries; taxes upon inheritances;[2] license taxes on occupations; duties on the sale of commodities, such, for example, as the stamp tax laid on proprietary articles during the Spanish War;[3] stamp taxes such as those on checks, mortgages, and other papers; and, apparently, taxes on incomes not derived from real or personal property.

Revenues and Revenue Bills

Except in case of war or shortage of revenue it was for a long time the practice of the federal government to rely upon indirect taxation as its prime source of revenue. It was the intention of the Fathers that indirect taxes should be the chief resort of the central government. In common with all statesmen they recognized the natural dislike of the people for any form of tax which must be paid directly out of their own pockets in lump sums to the government. Not only is a direct tax difficult to collect on

[1] During the Civil War a federal tax was laid upon incomes, gain, and profits by the year, and in Springer *v.* United States (102 U. S. R., 586) the Supreme Court held that this was an indirect tax, and therefore did not have to be apportioned according to population. The Court said in this case: "Our conclusions are that direct taxes within the meaning of the Constitution are only capitation taxes as expressed in that instrument and taxes on real estate; and that the tax, of which the plaintiff in error complains, is within the category of an excise or duty." Upon reëxamination of the question in connection with the income tax law of 1894, the Court maintained that a tax upon incomes from land is as much a direct tax as if levied upon the land itself at so much an acre, or according to its valuation. *Readings*, p. 328. In 1909, Congress passed and referred to the state legislatures an amendment to the federal Constitution authorizing Congress to impose an income-tax without apportionment. Ratified and proclaimed, 1913. See above, p. 371.

[2] *Readings*, p. 323.

[3] See above, p. 352.

account of this natural opposition to it; it is expensive to administer, owing to the necessity of repeated valuations of the property on which it falls and to the numerous operations required in laying and collecting it.

An indirect tax, on the other hand, has the advantage of great simplicity. It falls in small amounts upon each article of consumption, and it is easy to lay because it is imposed upon the same articles wherever they are found.

Accordingly, until 1917 the government derived its revenues from two prime sources, duties on imports coming from foreign countries, and internal revenue or excise taxes laid on spirits and tobacco. A slight departure from almost complete reliance on customs and excises was made in 1909 when a tax was laid on the incomes of corporations, and a still greater departure was made in 1913 when a Democratic Congress laid a tax of one per cent upon private incomes with certain exemptions. In 1917 it was decided to meet a large part of the cost of the war on Germany by a heavy tax on incomes, steadily rising with the size of the incomes, a progressive inheritance tax, and a heavy and graduated excess profits tax laid upon business and industrial concerns.

The Constitution definitely provides that all bills for raising revenue shall originate in the House of Representatives, but authorizes the Senate to propose or concur in amendments as in the case of other bills. It was the purpose of the framers of the Constitution to vest the power of imposing taxes in the hands of that branch of the national legislature which was nearer the people on whom the burden must fall. "The House of Representatives," says *The Federalist*, "holds the purse, — that powerful instrument by which we behold in the history of the British Constitution an infant and humble representation of the people gradually enlarging the sphere of its activity and importance and finally reducing as far as it seems to have wished all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any Constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance and for carrying into effect every just and salutary measure."

In spite of this confident prediction, however, the influence of

the Senate in shaping revenue legislation has been steadily on the increase, until it now frankly assumes, under its power to make amendments, what is for practical purposes the right of initiating revenue measures. For example, in 1871, the House passed an act repealing the existing duties on tea and coffee — a brief measure only a few lines long; and the Senate substituted for this proposal of a slight change, "an act to decrease existing taxes," designed to bring about a general revision of the laws imposing duties and internal taxes — in all a measure of some twenty printed pages. The House protested against this action on the part of the Senate, declaring it to be in conflict with the true intention and purpose of the clause of the Constitution which requires revenue bills to originate in the lower branch of the legislature. During the debate on the subject in the House, Mr. Garfield said: "It is clear to my mind that the Senate's power to amend is limited to the subject-matter of the bill. That limit is natural, is definite, and can be clearly shown. If there had been no precedent in the case, I should say that a House bill relating solely to revenue on salt could not be amended by adding to it clauses raising revenue on textile fabrics, but that all the amendments of the Senate should relate to the duty on salt. To admit that the Senate can take a House bill consisting of two lines, relating specifically and solely to a single article, and can graft upon that bill in the name of an amendment a whole system of tariff and internal taxation, is to say that they may exploit all the meaning out of the clause of the Constitution which we are considering, and may rob the House of the last vestige of its rights under that clause." In spite of the protest on the part of the House, the Senate was able to force the adoption of a considerable portion of its plan of revision.

Again in 1894, the Wilson tariff bill as it came from the House of Representatives was sadly mutilated in the Senate. In fact, "its revenue reform principles were hardly recognizable"; but in the conference committee the House of Representatives was forced to yield on almost all the points. Again, in 1909, when the Payne tariff bill came from the House of Representatives, it was referred to the finance committee of the Senate, of which Mr. Aldrich was chairman, and when reported back from that committee it was in many important respects a new bill.[1] As it

[1] In fact the Senate Committee had virtually prepared its own bill before the House bill was referred to it.

finally passed the Senate it contained a number of radical departures from the provisions of the House bill and in spite of the intervention of President Taft many of them were adopted during the sessions of the conference committee. It is generally believed that the Senate exerted far less influence in the drafting of the tariff measure of 1913 than it had exerted in forming previous revenue measures.

The actual work of preparing revenue bills in the House is assigned to the committee on ways and means. Tariff measures are drawn up by the members of the committee representing the party which has a majority in the House. When it becomes apparent that the temper of the country is demanding a revision of the tariff, the House of Representatives generally authorizes the committee to gather information preparatory to the adoption of the new schedules. For example, in the spring of 1908, the committee on ways and means was authorized, on the motion of its chairman, Mr. Payne, to sit during the recess of Congress and hold hearings to collect information upon which to base a revision of the tariff; and at the same time the Senate adopted a resolution authorizing its finance committee to secure expert assistance in making tariff investigations both before and after the introduction of the tariff bill in the House of Representatives.

It is a common practice for the committee to hold many sessions which are attended by the representatives of the various industries of the nation as well as by consumers and other persons interested in the tariff, who advance their respective claims for protection or for reduction.[1] When the majority members of the committee have taken all the evidence that they desire and thoroughly considered the issues involved, they draw up a complete bill which is sometimes discussed in the full committee. Inasmuch as a tariff bill is always a political measure, the minority members on the committee are generally not consulted at all, and may in fact know nothing about the exact provisions of the bill until it is reported to the House. The minority, of course, may present

[1] See *Readings*, p. 333, for the interesting extract from Mr. Dingley's *Memoirs*, describing the preparations of the Dingley bill. The hearings are always one-sided. It is the "interests" who prosecute their case with great zeal. Few consumers have the personal interest or knowledge to make their appearance before the committee effective.

a report of their own by way of protest, but it seldom amounts to anything.

When a revenue bill is reported to the House by the chairman of the committee on ways and means, it is debated in the committee of the whole on the state of the Union. The discussion at first is quite general, so that practically every member who has anything to say about the proposed measure is given an opportunity. The general debate is then followed by a debate on details under the five-minute rule. From time to time as the discussion proceeds, the committee on ways and means will report changes, the chairman of that committee as an astute party leader being quick to perceive the points on which it is expedient and necessary to yield. The bill as modified under the pressure of debate is generally passed by the House under "the previous question."

When the measure reaches the Senate, it is promptly referred to the committee on finance which has, as a matter of fact, been busy on its own bill and has watched with close scrutiny the progress of the discussion in the House. After making amendments or substituting practically a new bill, the committee makes its report to the Senate. The debate in that body, as we have seen, is unlimited; and the tariff measure usually receives far more penetrating criticism there than in the House.

After its passage, the bill purporting to be the original measure with Senate amendments is returned to the House, which promptly votes not to concur in the Senate amendments and asks for a conference. The Speaker, thereupon, appoints the chairman of the committee on ways and means and some other members to represent the House, and the presiding officer of the Senate selects the chairman of the committee on finance and certain other members to represent that body. The conference committee immediately begins a series of sessions which always end in a compromise, the Senate receding from some of its amendments and the House yielding on others. Sometimes the conference committee takes into its confidence the President, whose views as party leader with regard to the tariff cannot be neglected. As is well known, President Wilson exerted a considerable influence in the conference committee discussions in 1913 which led to an adjustment of the differences between the two houses. Throughout these various operations on the bill, it must be remembered, many provisions are framed with a certain knowledge that a

compromise will ultimately result. A compromise, therefore, is frequently no compromise. When the conference committee has come to an agreement, its report is immediately submitted to the House, where it is passed without amendment and then sent to the Senate, where it is likewise speedily accepted. Thereupon the bill goes to the President for his signature.

This method of drafting revenue measures is attended by some serious drawbacks. In the first place, no man or group of men can assume full responsibility for it. The President, who may have been elected on a platform favoring the reduction of the tariff, can do nothing more than exert such influence as his position and party leadership may give him His veto of a tariff bill would be an extremely drastic measure of control, resulting in great confusion to the business interests awaiting a settlement. In the House, the chairman of the committee on ways and means might be held at least partially responsible, were it not for the fact that the Senate has such an unlimited amending power.

In actual practice the most important points of contention are settled in the conference committee, so it may be said that the final word on tariff policy and revenue measures is said by a committee unknown to the Constitution. This is especially true because both houses are in practice constrained to accept the measure as reported from this committee, fearing to reopen a long and tedious debate and thus delay the conclusion of the matter indefinitely. The complete bill is, therefore, not a measure which has received in every point careful consideration by a responsible legislature; it is a series of compromises rushed through in its final form without deliberation. The great defects of this system are two: absence of precise responsibility and a tendency to cause the prolongation of an outworn tariff policy on account of serious obstacles in the way of a speedy and effective revision.

Appropriation Bills

The preparation of appropriation bills, unlike the preparation of revenue bills, is not concentrated in the hands of any single committee in the House of Representatives, but is intrusted to a number of committees. In the beginning of our history, when expenditures were relatively small, they were practically all prepared by the committee on ways and means, thus affording

some coördination between the taxing and spending branches of the government. This coördination was made even closer by the requirement of the act of 1789 creating the Treasury Department, which provided that the Secretary should prepare and report estimates of the public revenues and the public expenditures. Indeed the first Secretary, Alexander Hamilton, proposed to present his reports to Congress in person and to defend and explain them on the floor of the House.

In the course of time the responsibility for appropriations, at first concentrated in the hands of the Secretary and one committee of the House, was dissipated. In 1865, the scrutiny of appropriations was taken from the ways and means committee and vested in a committee on appropriations. In 1885 a further disintegration occurred when appropriations were distributed among a number of committees in the House. As a result, in time, there came to be in the House nine committees reporting at least fourteen separate appropriation bills and five committees reporting measures carrying a charge on the treasury. In the Senate at least fifteen committees had charge of appropriations. In the course of this evolution, the Secretary of the Treasury ceased to act as a minister of finance giving counsel and advice to Congress on the desirability of particular revenue or appropriation measures. In this regard, his duties became perfunctory. He merely collected from department heads the estimates of expenditures for the coming year, compiled them into the *Book of Estimates*, and transmitted the whole to Congress. As some one remarked, he merely acted as a messenger to carry to Congress the requests of spending officers for appropriations to meet their needs for the coming years.

Under this time-honored system, neither house of Congress ever had before it, while passing any one among fourteen appropriation bills, a complete programme of revenues and probable expenditures in totals. One appropriation bill would be reported out of committee, debated, perhaps amended, sent to the other house, debated and amended, adjusted in a conference committee representing the two houses, and finally sent to the President for his signature. The other bills followed at irregular intervals and not until the very end did any one have any accurate idea of how much money was being voted away. Instead of having a balance sheet before them all the time and considering

the entire revenue and expenditure programme as one programme (just as any well-managed business concern or household would do), Congress did its work in a piecemeal fashion. The result was for many years either a deficit or a huge surplus in the treasury, according to chance. It was not until after 1914, when mounting expenditures made the problem of adequate revenues a pressing one, that Congress took under consideration a reform in its methods. Drastic reform is doubtless many years off, even now.

Appropriation bills, when passed by the House, are transmitted to the Senate, and with some exceptions are referred to the committee on appropriations in that body. High officials and other persons, who were unsuccessful in obtaining increased or new appropriations in the House, immediately begin to besiege the Senate committees. Appropriation bills are debated in the Senate with more freedom than obtains in the House, and this freedom enables any Senator who desires a particular appropriation for his state to threaten to "talk some other bill to death" unless his terms are conceded. It is also a general practice for the Senate to increase very materially the appropriations adopted by the House. For example, it added to the House bills for the year 1907–08 sums amounting to more than $70,000,000.

As in the case of tariff bills, differences between the Senate and the House are adjusted by a conference committee representing the two bodies. The result is always a compromise which is accepted, as a rule, without reopening the discussion. We find here the same lack of responsibility and coördination which occurs in the case of revenue measures, and a total failure of anything like a proper adjustment of revenues and expenditures.

In Great Britain, the budget, embracing the estimated expenditures and the revenue measures to meet them, is prepared under the direction of a responsible minister, the Chancellor of the Exchequer, and when it is adopted it is a finished project which has received the final scrutiny of both houses. Of course, the minister may be wrong as to the estimates or the revenues which may accrue from his proposed measures; but at all events there is an actual attempt to balance the outgo and the income. In the United States, however, several groups of men have charge of spending money, while the chief revenue measure, the tariff act,

is designed by other groups for the protection of industries rather than for meeting the expenses of the government.

The Movement for Budget Reform

As the expenditures of the national government mounted, this method of making appropriations became the subject of severe criticism. It was urged that as revenues and appropriations were separated, the government never had a balance sheet showing income and outgo, but always worked in the dark. It was pointed out that no one in Washington was responsible for viewing expenditures as a whole and cutting them to meet receipts in such a way as to make a consistent, reasoned programme of public work. Neither the President nor the Secretary of the Treasury could be held accountable for formulating a scheme of expenditures for the great departments of government. In Congress, irresponsibility was even more marked. Department heads and others seeking appropriations constantly besieged the doors of the committees. Every government interest was represented in the pressure on the committees for larger appropriations. A new bureau or agency was created and it immediately began to lobby for increased funds. Army and navy officers, loyal to their branch of the service, always presented insistent claims for additional money. Then there was the interminable list of appropriations forced upon Congress through log-rolling — appropriations for post offices, river and harbor improvements, naval stations, docks, and other local public works.[1]

More than once members protested against these methods. "This practice," exclaimed Mr. Cannon in the House in 1902, "of going from committee to committee that, under the rules of the House, has jurisdiction, and then before the matter has been investigated, by the aid of a willing Senate, failing in one place, rushing to another that has not jurisdiction, and sticking in amendments here, there, and yonder, ought to be done away with. Appropriation for the next year, appropriation for this year, legislation here, legislation there. If action is continued along these lines, it will demoralize the matter of appropriation and bring scandal and criticism — deserved criticism — from the people of the country."

[1] See C. C. Maxey's article "A Little History of Pork," *National Municipal Review*, December, 1919.

Criticism of appropriation methods and especially the absence of responsibility for preparing the financial programme led in 1909 to the enactment of a measure designed to draw the President into the process. Under this act the Secretary of the Treasury was required to collect from all of the executive departments estimates of the expenditures necessary for the ensuing fiscal year and then to calculate the probable revenues for the same period. The act then provided that the President might, in case a probable deficit was shown by the treasury estimates, recommend ways and means for meeting the situation. This measure from which much was hoped at the time proved quite ineffective. Although President Wilson in his message of December 7, 1915, did act under its provisions, it has been for the most part utterly ignored.

Impatient at the fiscal methods employed by the federal government, President Taft requested Congress to grant an appropriation to conduct a general inquiry into the methods of transacting public business with a view to attaining greater efficiency and economy. By an act approved June 25, 1910, Congress granted the request and the "President's Commission on Economy and Efficiency" was created under the direction of Dr. Frederick A. Cleveland. This commission continued its work for three years and among its many important reports was a document entitled "The Need for a National Budget" (62d Cong., 2d sess., House document, No. 854). With the work of this Commission there began the agitation for the establishment of a national budget system for making appropriations, which led to the introduction of budget measures in both houses of Congress.

The term "budget system," though loosely used in common practice, is gradually coming to include a number of elements:

1. Responsibility for preparation of the budget, including estimates of revenues and expenditures for the coming year.
2. The form and content of the document or series of documents known collectively as "the budget."
3. Legislative action in the consideration and adoption of the budget, or strictly speaking the measures of law authorizing appropriations and providing revenues.
4. Measures and instrumentalities for carrying the appropriation and revenue laws into execution.

With reference to the first subject, all proposed budget legislation in Congress agreed in making the President responsible for presenting a budget to Congress. It is now generally conceded that the executive branch of the government should be made responsible for laying before the legislature a complete programme for revenues and expenditures.

As to the content of the budget, there is general agreement that it should include at least two important parts:

Part I. The revenue and expenditure programme, and information designed to elucidate it, embracing among other things:

1. A summary statement showing the total receipts and expenditures of the previous two years and the estimated receipts and expenditures for the coming year.

2. Details of the summary statement, including departmental requests for funds (and supporting data from department chiefs) with the allowances made by the executive set forth in parallel columns, presenting to Congress and to the public the work requirements as viewed by operating officials. This analysis should be linked line by line with the summary statement furnishing the supporting data for proposed changes.

3. An analysis of all increases over and decreases from the previous year, indicating the purposes for which they are made, such an analysis to present the public policy and work programme involved in each material increase or reduction.

4. Any collateral information necessary to explain the exact financial condition of the government, such as fund balance statement, surplus statement, a debt statement, an operating statement, and departmental reports of accomplishments.

Part II. Measures of law providing revenues and appropriating money for the purposes decided upon by the legislature. Revenue laws call for no discussion here, but attention should be drawn to the fact that they involve fundamental questions of public policy. As to the appropriation measures, it is generally agreed that appropriations in large amounts, "lump sums," are highly undesirable and that they should all be itemized to a certain degree for the purpose of securing control over the spending officer at whose disposal the funds are placed. It need hardly be pointed out that it is through the form of the appropriations that the legislature may control in minute detail the expenditures and work of the department head or bureau chief.

The problem of legislative procedure in dealing with the budget has received less attention from the hands of advocates of financial reform than its importance deserves. Experience has shown that the executive may present a well-planned programme of expenditures to the legislature, only to have it mutilated beyond recognition. All that he can do to preserve his programme is to send messages to the legislature and conduct secret negotiations with legislative committees in charge of expenditures. To meet this objection it has been proposed that: (1) the budget when submitted to the legislature should not be referred to a committee or committees, but should be considered first in committee of the whole, and that (2) the executive or his cabinet members should be present in person to explain and defend the budget proposals which they have formulated. The second of these projects was embodied in the New York state constitution of 1915 which was rejected by the voters, and it has been repeatedly advocated in the Congress of the United States.[1]

In 1918 a series of bills was introduced in the Senate of the United States by the Hon. Medill McCormick proposing the following reforms:

1. Giving the President through the Treasury Department the power of revising the estimates of expenditures and holding him responsible to Congress for the sums expended.

2. Abolition of the ways and means and the appropriation committees, taking power to report expenditure measures from all other committees, and the creation of one grand budget committee with power to add to the President's estimates only by a two-thirds vote.

3. Creation of a single auditor-general appointed by and responsible to the House of Representatives.

4. Abolition of the nine committees on expenditures in the several departments and the creation of a single committee of departmental accounts to coöperate with the auditor in the supervision of all expenditures.

5. Remove from the Treasury Department all services not related to the receipts and expenditures of the federal government.

In the autumn of 1919, the House of Representatives passed by an overwhelming majority a measure introduced by Mr.

[1] See *Municipal Research*, Numbers 61, 62, 63, 80, published by the New York Bureau of Municipal Research.

Good, of Iowa, providing for a consolidated budget to be presented by the President to Congress. The measure called for the creation of a budget bureau directly under the personal supervision of the President, with the thought that he should be held immediately responsible for the formulation of the expenditure and revenue policies of the government. At the same time a resolution was introduced in the House of Representatives centralizing control over all appropriation measures in the hands of a single committee.

The Good bill was challenged in the Senate, particularly by Senator McCormick, who contended that owing to the nature of the work, the Secretary of the Treasury should be made the responsible budget officer of the government. To those who were anxious to place the responsibility squarely upon the President, he replied that as the President appointed and could remove the Secretary of the Treasury he was in effect responsible for the acts of his agents. The budget would therefore be a presidential budget no matter who was immediately charged with the duty of assembling and reviewing the estimates prepared by the department heads. In reply to this contention it was urged in defence of the Good bill that the Secretary of the Treasury, being merely a peer among peers in the cabinet, could not in fact exercise any very drastic powers in the way of reductions in requests for funds. Inasmuch as all political parties are pledged to some kind of a budget system, it is highly probable that its establishment cannot long be delayed, but at the opening of 1920 there were not many signs of a thoroughgoing reform effective enough to sweep away the evils of the log-rolling and the "pork barrel." [1]

The Collection of Revenues

The collection of the revenue is intrusted to two branches of the Treasury Department — one having charge of the customs duties and the other the internal revenue. For the collection of

[1] American literature on the budget has grown rapidly during recent years. Willoughby and Lindsay, *Financial Administration of Great Britain;* R. Stourm, *The Budget* (translation of a famous French work); W. F. Willoughby, *Problem of the National Budget;* Collins, *National Budget System.* There is an amusing and informing paper by Dr. C. C. Maxey entitled "A Little History of Pork" in the *National Municipal Review*, December, 1919, which describes clearly and accurately the historical development of "log-rolling" and the "pork barrel."

import duties the country is divided into customs districts, each having a port of entry and a set of officials, including the collector, appraisers, special agents, inspectors, etc. The internal revenue and the revenue from the income taxes are under direct charge of the commissioner of internal revenue, appointed by the President and Senate. For purposes of administration the country is divided into a large number of districts, each of which is in charge of a collector appointed by the President and the Senate. The collector has under him a corps of officers and agents, some engaged in the routine work and others acting as detectives to prevent frauds.

The revenues of the United States in taxes, fees, postal charges, etc., are stored in Washington and in nine subtreasuries located at Baltimore, Boston, Chicago, Cincinnati, New Orleans, New York, Philadelphia, St. Louis, and San Francisco.

"An act of Congress approved on March 3, 1917, directed the bureau of efficiency to investigate the work performed by the subtreasuries to determine what part of their work can be performed by the federal reserve banks or other government offices. The report submitted on January 28, 1918, recommended the immediate suspension of the subtreasuries in Baltimore, Philadelphia, and Cincinnati, the immediate release of the assistant treasurers in the six remaining subtreasuries, and the consolidation of the entire subtreasury system with the federal reserve banks within six months after the end of the war."[1] Action on this recommendation was delayed, although it was generally admitted that the subtreasury system, created in other days, was no longer necessary to the efficient administration of federal finances. At the beginning of 1920 the end of the system, or at least a radical curtailment of it, seemed to be in sight. It was openly said that nothing but inertia and patronage continued the existence of the subtreasuries and that their abolition was only a question of time.

The Secretary of the Treasury is, furthermore, authorized to put portions of the public funds into federal reserve banks, apportioning the funds among the regional banks largely at his own discretion.

This power in the hands of the Secretary of the Treasury is an enormous one, for it allows him to give or withhold the aid of

[1] *The American Year Book*, 1918, p. 386.

the government in time of stringency. It was the regular policy of Secretary Shaw to come to the aid of the money market whenever a crisis was threatened, by distributing government funds among the banks whose surplus reserves had run low. In February of 1906, $10,000,000 was transferred to national bank depositories of seven principal cities. This action failing to bring relief, the Secretary offered to make additional deposits, on the basis of satisfactory security, equivalent to the amount of gold which the specified banks had engaged for importation, and as a result brought about $50,000,000 of foreign gold into the United States. Thus a large amount of government money was placed in circulation through the banks, foreign gold was secured, and the money stringency relaxed. In the panic of 1907, Secretary Cortelyou likewise came to the aid of the money market with federal funds. The advantage of this policy not only to the banks but to the borrowers of money is evident even to the superficial observer; but the intimate connection which it establishes between the government and private interests is obviously full of grave dangers.

The Monetary System

Under the Constitution, Congress has power to coin money and regulate its value and also to borrow money. It will be noted that Congress is not expressly authorized to issue paper money in any form. The Articles of Confederation gave the confederate congress the power to borrow money and emit bills on the credit of the United States; and in a draft of a constitution submitted to the convention of 1787 by Mr. Pinckney, it was proposed to continue this provision. However, on the motion of Gouverneur Morris, the phrase "emit bills on the credit of the United States" was struck out, after a considerable debate, in which the opinion was expressed that it would have a most salutary influence on the credit of the United States to remove even the possibility of paper money. Nevertheless, it is not absolutely certain that it was the intention of the framers of the Constitution to prevent the issue of paper money in any form, for Mr. Madison believed that the omission of the phrase relative to bills of credit did not deprive the government of the use of public notes "so far as they could be safe and proper."

At all events, Congress, under the special financial stress of the

Civil War, did authorize the issue of paper and declared it to be lawful money and legal tender for the payment of all debts, public and private, except duties on imports, demands against the United States, and interest payable in coin. The constitutionality of this law was speedily tested, and the Supreme Court of the United States held that an act making mere paper promises to pay legal tender in the discharge of debts *previously* contracted was not a means appropriate and necessary and really calculated to carry into effect any express power vested in Congress, and was inconsistent with the spirit of the Constitution and prohibited by that instrument.[1] After a reorganization of the Supreme Court, the case was again submitted to that tribunal, and it was then held that the legal tender acts were constitutional as to contracts made before and after their passage by Congress — a strong argument, being based on the necessities of war time. Even this argument was cast aside later, when, in 1878, Congress passed an act that the Treasury should not retire or cancel legal tender notes on their redemption, but reissue them and keep them in circulation; and the measure was upheld by the Court.[2] As a result, it may be said that Congress may create legal tender notes whenever it may be deemed necessary.

The power over the monetary system is virtually exclusive in Congress, for according to the express provision of the Constitution no state can coin money, make anything but gold and silver coin of the United States a tender in the payment of debts, or emit bills of credit. A bill of credit has been defined by the Supreme Court as a paper medium issued by a state on its own authority, designed to circulate between individuals and between the government and individuals for the ordinary purposes of society.[3] This limitation, however, was later interpreted in such a way as to authorize the issue of paper money through a public corporation in which the state was the sole or principal stockholder, for the Court maintained that to constitute a bill of credit within the meaning of the federal Constitution it must be issued by the state, "on the credit of the state," and designed to circulate as money.

Under this states' rights interpretation, the provision of the

[1] Hepburn *v.* Griswold, 8 Wallace, 603.
[2] Juilliard *v.* Greenman, 110 U. S. R., 421.
[3] Craig *et al v.* Missouri, 4 Peters, 410.

federal Constitution forbidding states to emit bills of credit was substantially annulled, and an enormous amount of state bank paper, often without a sound currency basis, was put into circulation, with what results every student of "the middle period" of our history is well acquainted.

At length, in 1866, Congress determined to centralize the monetary control, and it accordingly passed an act imposing a tax of ten per cent annually on all state bank issues. The tax was upheld by the Supreme Court of the United States in the case of Veazie Bank *v.* Fenno, and thus the states were forced out of the paper money business.[1]

The money of the United States now falls into two groups: paper and coin. The former embraces United States notes or, as they are more popularly known, Civil War "greenbacks," which are in circulation under the redemption act which went into effect in 1879, placing them on a gold basis; treasury notes issued under the act of 1890 for the purchase of silver (now repealed); gold certificates issued whenever the reserve in the Treasury is above $100,000,000; silver certificates issued for the purchase of silver under the Bland-Allison bill of 1878 (now repealed); and Federal Reserve notes. The monetary system was put on a gold basis by act of Congress in 1900.

The preparation of the paper money of the United States is in charge of the bureau of engraving and printing in the Department of the Treasury. The coins are made at three United States mints — Philadelphia, San Francisco, and New Orleans. In addition to the mints, federal assay offices are maintained at New York, St. Louis, Denver, Seattle, and a few other points where private persons may deposit gold and silver bullion and have its value determined by experts.

From the early days of American history, the problem of currency and banking has been almost continually before the country and some of the greatest political battles, as for example in 1832 and 1896, have been over this issue. One of the significant questions has been "How is it possible to adjust the amount of money in circulation to the demand for it in business and indus-

[1] It is impossible to give here even the most meagre outline of the long and complicated history of the American monetary system. For this, see the admirable work by Professor Dewey, *Financial History of the United States*.

try?" Some contend that the work of issuing currency should be left entirely to the federal government, while others hold that it can be better done by private banking corporations in close touch with business requirements. Another question has been "How is it possible to prevent the bank deposits of the country from drifting to the great cities, particularly New York, and coming under the control of a few great banking concerns?"

A serious attempt to solve some of the vexatious currency questions was made in the Federal Reserve Act of December, 1913. The leading features of this measure were as follows:

1. Provision for Federal Control. A Federal Reserve Board, composed of the Secretary of the Treasury and the Comptroller of the Currency and five persons appointed by the President and Senate, was created to exercise general supervision over the entire banking system. The country was laid out into twelve great districts and in each is designated a Federal Reserve Bank, controlled by six directors chosen by the "member banks" and three appointed by the Federal Reserve Board. National banks were required, and certain state banks permitted, to join in the organization and they are known as member banks sharing in the control as above noted.

2. The Issuance of Notes. The Federal Reserve Board is empowered to issue Federal Reserve notes to the Reserve Banks to be put into general circulation. The money thus issued is based on certain securities held by the Reserve and member banks and is the lawful money of the United States. By this measure an attempt was made: (1) to secure federal control, (2) to give local banks a share in the management of the system, (3) to distribute "the money power" over a wide area, and (4) to provide for the expansion and contraction of the currency to meet business demands.

The general supervision of taxation and finance in all its branches is vested in the Secretary of the Treasury Department, who must scrutinize the annual collection and disbursement of hundreds of millions of dollars and account accurately for every penny of it — a huge bookkeeping undertaking. He must also master the theoretical and practical questions of finance, in order to make recommendations to Congress and to meet the demands of that body for expert advice; and he must secure a fair and impartial administration of the customs duties which

are irritating to importers at best and doubly irritating when administered in an irregular and arbitrary fashion.

In addition to the functions connected with the collection and disbursements of public funds, the Treasury Department contains three very important agencies: (1) the farm loan board which administers the system established for making loans to farmers; (2) the bureau of war risk insurance which administers allowances and allotments to soldiers and sailors and their dependents; (3) the public health service which during the World War assumed responsibilities of a high order in helping to safeguard the health of enlisted men, and also aided states and localities in improving the health standards. Through this branch of the administration the federal government is rendering invaluable assistance to local agencies.

CHAPTER XIX

THE REGULATION OF COMMERCE

The Power of Congress Judicially Interpreted

CONGRESS has power to regulate commerce with foreign nations, among the several states, and with the Indian tribes; and it may make all laws necessary and proper to carry this power into effect.[1] The term "interstate commerce" has been interpreted by a long line of judicial decisions to include the carriage of passengers, the transportation of commodities, and the transmission of ideas, orders, and information by telephone or telegraph from a point in one state to a point in another.[2] In a word, it covers traffic and intercourse in its broadest sense regardless of the changes which time and mechanical ingenuity have wrought. It does not, however, include life, fire, and marine insurance or ordinary contractual relations, even though the latter are incident to the conduct of interstate business.

Notwithstanding the seeming clearness of this definition of the power of Congress over interstate commerce, it is very difficult to draw the line between acts affecting commerce wholly within a state and acts affecting commerce between states.[3] In general we may say, however, that the Supreme Court has upheld state legislation primarily designed for legitimate local purposes, although it may impinge at points on interstate traffic.

Federal Control of Interstate Commerce

The statutes now in force regulating interstate commerce may be classified into three groups: (1) those controlling railways and common carriers; (2) those designed to prevent trusts and

[1] This power is subject to the limitation that Congress cannot lay duties on exports from any state, give preference to the ports of one commonwealth over those of another, or compel vessels bound from one state to another to enter, clear, or pay duties in any state.

[2] For the constitutional provisions and an important illustrative case, see *Readings*, p. 343.

[3] For an illustrative case, see *Readings*, p. 348. See below, chap. xxii.

combinations in restraint of trade; and (3) those aimed at miscellaneous objects, such as the pure food law and the law imposing liability on railway corporations for injuries to their employees.

In the beginning of the railway era in the United States, Congress made no attempt to devise a large and far-sighted plan of public control, but negligently devoted its attention to granting generous favors to railway corporations. As a result all early railway legislation deals with grants of public lands, concessions of "rights of way," the remission of duties on railway materials imported from abroad, and kindred measures favoring a rapid development of the railway system.

There was practically no agitation for regulation in the interest of the public until the close of the Civil War. In 1868, the House committee on roads and canals reported that Congress had power to regulate interstate railways, secure the safety of travellers, and prescribe uniform and equitable rates and adequate connections; but the House failed to act. Again, in 1872, on a recommendation embodied in the President's message, a Senate committee devised a comprehensive plan for regulating railways, but there was no practical outcome. In and out of Congress, however, railway regulation had become the subject of earnest discussion. The connection of many Congressmen with great railway interests was notorious, and it was believed, with good reason, that railway corporations were buying support in the national legislature.

At length, in 1885, when it was apparent that the demand for reform could be no longer disregarded, the Senate appointed a committee which conducted a long investigation into the operation of railways throughout the United States and made a presentation of such notorious abuses that Congress was compelled to act.[1] The result was the law of 1887, creating an Interstate Commerce Commission and providing certain regulations for common carriers.

This original act, the amendatory and supplementary acts, the decisions of the courts, and the orders and decisions of the Commission now constitute a formidable body of federal law, and it is impossible to give here more than a brief statement of the general principles.[2]

[1] For an extract from this Report, see *Readings*, p. 352.

[2] Consult Judson, *The Law of Interstate Commerce.*

The administration of the law is placed in the hands of an Interstate Commerce Commission which is entirely separate from the Department of Commerce. This commission consists of eleven members appointed by the President and Senate and paid a salary of $12,000 each.

The Act to Regulate Commerce, as the law is called, applies to corporations and persons carrying oil or other commodities, except water and gas, by means of pipe lines, or transporting passengers or property by railway or by rail and water from one state or territory into another state or territory, or from one place in any territory to another place within the same territory, or from any place in the United States to a foreign country.[1]

A large number of restraints are laid upon the carriers and corporations to whom the Act applies. All charges for services in connection with transportation of passengers or property must be just and reasonable; no common carrier can grant free passes or free transportation except to certain specified persons and institutions; and railroad companies are forbidden to transport commodities in which they have a direct property interest, except timber and its products. Common carriers must construct switches and make connections with lateral and branch lines of railways. They cannot grant rebates, drawbacks, and special rates, thus discriminating and making lower charges to some persons than to others for similar services; they cannot give any undue or unreasonable preference or advantage to any particular person, company, corporation or locality; and they are forbidden to make arrangements for pooling freights of different and competing railways, or for dividing among themselves the net proceeds of the earnings of such roads. They must print and keep open for public inspection schedules showing rates, fares, and charges for transportation, and no change can be made in the rates, fares, and charges so published except after thirty days' notice to the Interstate Commerce Commission. Finally they must also render full and complete annual reports to the Commission in the manner prescribed by that body; and there is now established

[1] The Act does not apply to the transportation of passengers or property or to receiving, delivery, storage or handling of property wholly within one state. The Elkins law of February 19, 1903, prohibits rebating and allows proceedings in the courts by injunction to restrain common carriers from departing from the published rates.

one uniform system of railway accounting throughout the United States.

Certain specific powers and duties are vested in the Interstate Commerce Commission by law. The Commission is required to investigate the manner in which business is conducted by those carriers to whom the law applies; and on the request of the Commission any district attorney of the United States must prosecute, in the proper court, offenders against the law. The Commission is empowered to summon witnesses and compel the production of books, papers, and other documents relating to any matter under investigation. Any person, corporation, body politic, or municipal organization complaining of anything done or omitted to be done by any common carrier, contrary to the provision of the law, may apply to the Commission by a petition stating the facts, and the Commission must thereupon make an investigation into the alleged violations. The Commission is empowered, after full hearing upon such a complaint or upon complaint of any common carrier, to determine and prescribe just and reasonable maximum rates and charges, as well as just and reasonable regulations and practices. The Commission may furthermore award damages to persons injured by a violation of the law on the part of any common carrier.

After a long agitation of the subject Congress enacted a law (approved March 1, 1913) providing for the "physical valuation" of the property of the railways coming under the provisions of the interstate commerce act.

The railway question entered a new phase during the administrations of President Wilson. In December, 1917, the railways were taken under governmental control by presidential proclamation, and by an act (March, 1918) Congress provided the terms of government operation.

Early in 1920, the railways were returned to their owners by an act of Congress embracing the following outstanding features: (1) provisions for federal loans to railways, (2) the creation of a labor board consisting of nine members — three from the railways, three from the employees, and three from the public — empowered to deal with labor disputes; (3) the enlargement of the Interstate Commerce Commission to eleven members: and (4) a practical guarantee to the companies of a return of $5\frac{1}{2}$ per cent on their properties for two years.

In the meanwhile the government is also endeavoring to control the great trusts and corporations engaged in interstate business. The way in which one industry after another has been absorbed by corporations, national and even international in the extent of their operations, is a matter of recent and familiar history. All great staple industries are now consolidated; and everywhere competition is being stifled by the combination of competing concerns. Moreover the control over the bank deposits throughout the whole United States is tending likewise to centralize in the hands of large financial institutions which work in conjunction with the business organizations.

In the very beginning of this revolution there were a few statesmen who saw that the arm of the government must be used in some way to check and control the men in whose hands this enormous power over capital, commerce, and industry was concentrating; but it can hardly be said that there has been any general agreement either as to the temporary or final nature of that control. A protest against the inaction of the federal government in the face of this great economic centralization was made by the radical minor parties shortly after the Civil War; and they grew more insistent as time advanced. At length, in 1890, Congress passed a law designed "to protect trade and commerce against unlawful restraint and monopolies," — the famous Sherman Anti-trust Act.[1] By this law, it was provided that every contract, combination, in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states and territories and with foreign nations was illegal; and appropriate penalties were prescribed for violations. Under the interpretation of the Supreme Court, the law was at first held to forbid all combinations among common carriers in restraint of trade, whether reasonable or unreasonable; but in the Standard Oil and Tobacco Trust cases in 1911 the Court laid down the rule that only those combinations which "unduly" restrained trade violated the law.

It must be noted, however, that under the law, corporations or trusts, as such, cannot be regulated; they must be engaged in interstate or foreign commerce in order to come within the terms of the act. In the Sugar Trust case,[2] for example, the Court held

[1] This Act is in the *Readings*, p. 358.

[2] United States *v.* E. C. Knight Co., 156 U. S. R., 1.

that the Anti-trust law did not control a great sugar company which had secured practically a monopoly of the manufacture of sugar in the United States by purchasing the stock of the various refining companies. The ground of the opinion was that the monopolies forbidden by the law were those actually involving interstate or foreign commerce, not those simply controlling the manufacture of commodities, even though such commodities afterward entered interstate and foreign traffic.

Where, however, a number of companies, engaged in the manufacture of some article, form an organization, divide the territory of the United States among themselves for the sale of that article, and suppress competition, the Act applies. The Court has also held on the same ground that, when the direct, immediate, and intended effect of a contract or combination among dealers in a commodity is the enhancement of prices and suppression of competition, it is a restraint in that commodity.[1]

The Sherman Act likewise applied to trade unions whose operations affect interstate commerce, as well as to other combinations. For example, in the case of Loewe *v.* Lawlor the Court held that when a labor organization, by the use of labels and notices in labor papers and other means, boycotts a manufacturing concern doing a large interstate business, the said organization becomes a combination in restraint of trade and is liable to the penalties of the Anti-trust Act.[2] In spite of the formidable appearance of the Sherman law, its effect in checking the formation of trusts and combinations was very slight.

During the opening years of the twentieth century there came a clearer understanding of the nature of our economic development, and the undiscriminating criticism of all corporations was replaced by saner views based upon the recognition of the fact that the era of small competing business concerns is at an end. Nevertheless, there still is a large variety of opinions as to the fundamental nature and tendency of our economic development. Only relatively few men in public life to-day assume the attitude of the past generation that trusts and corporations, as such, should be broken up. A large number of publicists would discriminate between what they are pleased to call "good" and

[1] Addyston Pipe and Steel Co. *v.* United States, 175 U. S. R., 211.
[2] 208 U. S. R., 274.

"bad" trusts, placing in the former category those business concerns which do not attempt complete monopolies and unreasonable enhancement of prices and in the latter category those corporations which are constantly violating the law and endeavoring to create monopolies. Finally there are the socialists, who contend that monopoly is the inevitable result of competition, that competition is a crude and wasteful method of doing business, and that the ultimate outcome will be the assumption of the ownership of the great monopolies by the government.

At all events there is, at the present time, a decided movement away from the old blind hostility to corporations, in the direction of some form of government regulation. In this movement, Mr. Roosevelt took a prominent part. When governor of New York, he said in a message to the legislature: "Much of the legislation, not only proposed but enacted against trusts, is not one whit more intelligent than the mediæval Bull against a comet, and has not been one particle more effective." As President, he said in his annual message to Congress in 1905: "It is generally useless to try to stop all restraint on competition, whether this restraint be reasonable or unreasonable; and when it is not useless, it is generally hurtful." In his Report of 1908, the commissioner of corporations declared: "There is an irresistible movement toward concentration in business. We must definitely recognize this as an inevitable economic law. We must also recognize the fact that industrial concentration is already largely accomplished in spite of general statutory prohibition. Recognizing these facts, the aim of new legislation should be to regulate rather than to prohibit combination. . . . Our present law forbidding all combination, therefore, needs adaptation to the actual facts." [1]

During President Wilson's administrations there were enacted a number of important laws dealing with trusts, commerce, and labor:

1. Clayton Anti-trust Law of 1914. This measure was designed in part to make the provisions of the Sherman law more drastic and sharper. It also attempted to tear corporations apart by forbidding interlocking directorates, devices by which the same persons acting as directors of several concerns can really consolidate their policies without actually uniting the companies.

[1] *Report of the Department of Commerce and Labor* (1908), p. 306.

2. Exemption of trade unions from the provision of the anti-trust law. This was accomplished by the above act.

3. The federal trade commission (1914). By law Congress swept away the old bureau of corporations and created a commission of five members with full power to investigate the books, papers, and operations of all corporations engaged in interstate business. The act declared "unfair methods of competition" to be unlawful and authorized the commission to prevent corporations from using such methods.

4. The Webb law (April 10, 1918) authorized the formation of combinations for foreign trade purposes. It provides that the anti-trust legislation shall not be construed as "declaring illegal an association entered into for the sole purpose of engaging in the export trade . . . or an agreement made or act done in the course of export trade by such an association, provided such association, agreement, or act is not in restraint of the export trade of any competitor of such association."

5. The Shipping Act (1916). This measure created the United States shipping board "for the purpose of encouraging and developing a merchant marine and a naval auxiliary and for the regulation of shipping."

6. The Adamson law (1916) fixing an eight hour day for trainmen on railways in interstate commerce.

7. The child labor law of 1916. This measure excluded from interstate commerce goods made by children under the age limit fixed by the law. This measure came before the Supreme Court of the United States in the case of Hammer *v.* Dagenhart, 247 U. S. 251, in 1918 and was declared unconstitutional by vote of five to four judges. The court held that the child labor law was not really a regulation of interstate commerce but a regulation of the conditions of manufacturing within the states. It was also contended by the court that the law usurped powers reserved to the states by the Tenth Amendment to the Constitution and would deprive citizens of their property without due process of law as provided in the Fifth Amendment. An attempt was then made to prevent child labor by federal act (Revenue Act of 1918) through the exercise of the taxing power — heavily taxing the profits of companies using child labor — thus indirectly accomplishing the same result.

Foreign Commerce — Immigration

Under the general power to regulate commerce, Congress enjoys full authority over the admission of immigrants to the United States. For a long time, the principal object of our immigration laws was to encourage the coming of foreigners to our country; but within recent years several attempts have been made, not so much to check immigration, as to eliminate the more undesirable elements, such as those afflicted with dangerous contagious diseases, criminals, paupers, and other persons likely to become public charges.

The immigration law of the United States now makes provision for the exclusion of three types of aliens: (1) the generally undesirable; (2) contract laborers; and (3) the Chinese and other Orientals.

The first group embraces idiots, feeble-minded persons, epileptics, paupers, persons likely to become public charges, professional beggars, persons affected with tuberculosis or loathsome or dangerous contagious diseases, criminals, polygamists, anarchists, and prostitutes. It especially provided, however, that foreigners, who have been convicted of purely political offences not involving moral turpitude, will not be excluded if they are otherwise admissible.

The law also excludes contract laborers, that is, persons who have been induced to migrate to this country by offers or promises of employment or in consequence of an agreement to perform labor of any kind, skilled or unskilled.[1] The law provides, however, that skilled laborers may be imported, if unemployed laborers of like kind cannot be found in the country.

The third group of aliens to whom admission is denied are excluded under a series of treaties and agreements with China and Japan and laws of Congress enacted especially on demand of the working classes and the inhabitants of the states on the Pacific Coast.[2] According to the terms of these laws, rules, and treaties, all Chinese are excluded, except teachers, students, travellers

[1] It is a misdemeanor for any person or concern to assist or encourage the migration of such laborers into the United States. Actors, singers, and professional classes are not included in this group.

[2] There is no special law or treaty excluding Koreans or Japanese laborers from the United States; but the Japanese government, by arrangement with the federal authorities, is supposed to control the emigration of its

for curiosity or pleasure, merchants and their lawful wives and minor children, officials of the Chinese government and their servants, and certain other classes. To prevent violations of the law, provision is made for authorizing and registering the admission of Chinese who fall within these groups. The administration of the law, including the right to admit and exclude in accordance with the regulations, is vested in the immigration authorities, with an appeal to the commissioner-general of immigration at Washington; and the decision of these administrative officers with regard to the facts in any case is not subject to judicial review.[1]

The cost of administering the immigration laws is partially met by a small tax levied on every alien entering the United States.[2] Every immigrant is required to state whether married or single, whether able to read or write, whether in possession of $50, or if less, how much, whether intending to join a relative or friend, and if so, when and where, and to give his nationality, race, calling, or occupation, last residence, and final destination,— in addition to answering a number of other questions. Thus, a complete record of each immigrant is secured, in order that the government may keep a close scrutiny over the persons whom it admits. The government has furthermore instituted a searching medical examination. Each immigrant is examined by an inspector for mental diseases, then by an inspector for internal diseases, and finally by an inspector of diseases of the eye.

After running the gauntlet of the medical inspectors, the immigrant is then closely questioned by a general inspector with regard

laborers to the United States by refusing to issue passports to them. Under an act of Congress, approved February 20, 1907, whenever the President is satisfied that passports, issued by any foreign government to its citizens authorizing them to go to other countries than the United States, are really being used for the purpose of enabling the holders to enter the continental territory of the United States to the detriment of labor conditions therein, it is his duty to refuse admission to the citizens of the country issuing such passports. By virtue of the authority of this act, President Roosevelt, in March, 1907, issued an order that Japanese or Korean laborers, skilled and unskilled, who have received passports to Mexico, Canada, or Hawaii and attempt to enter the United States, should be excluded from our continental territory.

[1] See *Readings*, p. 202.

[2] Of course persons in transit through the United States and diplomatic officers are not taxed.

to his desirability as an inhabitant of the United States. "The modus operandi at all government stations," says the former New York commissioner, Mr. Wachthorn, "is to place every individual applicant for admission to these shores on the defensive and to make it incumbent upon him . . . to show why he should be admitted; but to do it in a humane spirit and treat each applicant with becoming consideration, without for a moment losing sight of the object that Congress had in view in limiting admission to these shores to those who are sound in body and mind and who are without question likely to find support without depending in whole or in part on public or private charity."

Aliens whom the examining inspector is doubtful about admitting are held for examination before a board of special inquiry at each port charged with hearing and deciding such cases. An appeal from an adverse decision of the board may be carried through the commissioner of the port and the commissioner-general of immigration to the Secretary of Labor. Excluded aliens must be returned to their homes by the steamship companies which brought them.

The general supervision of the whole system of immigration is vested in the commissioner-general of immigration in the Department of Labor. He may establish rules, prescribe forms of reports, entries, and other papers, and he may issue orders and instructions not inconsistent with the law, which he may deem useful in carrying out the provisions of the immigration act and in protecting aliens from fraud and loss. It is his duty, from time to time, to detail officers from the immigration service to make investigations of the number of aliens detained in penal, reformatory, and charitable institutions throughout the United States and to look after the deportation of aliens who have become public charges. At each port of entry, there is a commissioner of immigration who has under him a staff of inspectors and other officials.

The power of the Immigration Commissioner to deport aliens is broad and sweeping in its scope. In 1918, Congress added to his authority by providing for the expulsion of alien revolutionists, anarchists, advocates of sabotage, violence, and assassination, and those aliens who aided and abetted them. His decision on the facts in any case is final (unless reversed of course by his chief, the Secretary of Labor), and the burden of proof

is upon the alien arrested and held for deportation to show that he is not in the United States in violation of the law. The courts will not go behind the findings of the immigration authorities as to the facts constituting the charge against the alien.

The fear of a flood of immigrants from Europe on the close of the Great War led Congress, powerfully influenced by the American Federation of Labor, to enact in 1917, over the veto of the President, an immigration bill providing a "literacy test" for immigrants. The law excludes all aliens over sixteen years of age, physically capable of reading, who cannot read the English language or some other language or dialect, including Hebrew or Yiddish. There were a few saving clauses with exemptions, but the bar was on the whole very rigid. This measure strictly applied will exclude from the country a large volume of unskilled workmen and reduce the competition with American labor.

Foreign Commerce — Tariff

The history of tariff legislation runs back to the revenue act passed by the first federal Congress of 1789, for that law, in imposing duties on foreign goods coming into the United States, contained some protective features. Washington in his message of January, 1790, recommended the promotion of such industries as would make the United States "independent of others for essential, particularly for military supplies," and Hamilton in his famous Report of the following year declared that the real interests of the country, in his opinion, would be advanced rather than injured by "the due encouragement of manufactures." This notion steadily gained ground, especially because the country was practically dependent upon England for manufactured goods.

The War of 1812 gave a great impetus to this demand for an increased protection of American industries in order to give them a start against European competition and to make the nation economically independent. During the war, American manufacturers, freed for a time from English competition, leaped forward with remarkable strides, and when peace was restored they asked for continued protection, especially for the establishments which they had set up. The tariff bill of 1816 was placed upon a broad nationalist basis. Mr. Calhoun declared that encouragement to American manufacture was "a sound national,

[1] *Report of the Secretary of Commerce and Labor* (1908), p. 10.

truly American policy." Mr. Clay urged: "The object of protecting manufactures was that we might eventually get articles of necessity made as cheap at home as they could be imported, and thereby produce an independence of foreign countries."

For a time, this protectionist policy was regarded as a temporary makeshift to give our "infant industries" a start with a view to enabling them ultimately to meet European competition in a fair open contest. However, this idea was slowly abandoned in the North as the protected interests came to be a powerful factor in determining revenue policies; but in the South the tariff continued to be stoutly resisted until long after the Civil War on the ground that it merely enriched the northern manufacturing states at the expense of the states which produced cotton and raw materials —that is, made the latter pay high duties on manufactured goods purchased in exchange for the raw materials sold in foreign markets.

The Republican party in the campaign of 1860 declared unequivocally for the protection of American industries,[1] and after the outbreak of Civil War the government was forced to fix high tariff duties in order to raise revenues — and thus a combination of circumstances led to the adoption of the highest tariff rates which had yet been made. This policy was continued, however, with some slight modifications [2] after the war, and in 1890 a still higher rate was provided by the McKinley bill, — a rate which proved to be so high that it produced a reaction throughout the country that resulted in a restoration of the Democratic party to power. The Democrats at once set to work on a new tariff bill, but they were unable to agree on any very drastic reductions, except in the duties on wool, so that their tariff measure of 1894 (the Wilson bill) cannot be regarded as a serious departure from the protectionist policy. Moreover, it failed to produce revenues as expected, and when the Republicans were returned in 1897, they revised the tariff again by the Dingley bill, which was in many respects an advance in rates over the McKinley measure. This law remained in force until 1909, when the Republicans at a special session made another general revision without adopting any striking reductions.[3]

[1] *Readings*, p. 99.

[2] Note especially the revisions of 1870, 1872, and 1883.

[3] For the general character of a tariff bill, see *Readings*, p. 337. The tariff act of 1909 provided that an additional duty of 25 per cent ad valorem might

During the passage of this bill it became evident that there was no very distinct line of division between the Republicans and the Democrats on the tariff, for the latter on particular matters affecting their several localities were as strongly protectionist as the former. Indeed, the cleavage was within the Republican party, for a number of Republicans, especially from the Middle West, refused to vote for the bill in its final form.

Discontent with the tariff of 1909 was immediate and widespread, and at the election of the following year the Democrats captured the House of Representatives largely on a tariff reform programme. The election of 1912 gave the Democrats the presidency as well as both houses of Congress and at an extra session in 1913 they enacted a tariff law which made substantial reductions and greatly increased the free list.

In connection with federal control over commerce, it should be noted that foreign commerce may also be regulated by the President and the Senate under their treaty-making power. They might, for instance, arrange with a foreign country a treaty waiving some of the provision of the tariff act, or adding to the terms of the immigration law. There is no doubt that a treaty, duly ratified, is as much a part of the law of the land as is a statute, and, as the later expression of the lawgiver always replaces any preceding law that is inconsistent or repugnant, there is no doubt that a treaty affecting foreign commerce would supersede any preceding act of a Congress, in so far as there might be a conflict.

Departments of Commerce and Labor

Notwithstanding the amount and variety of federal legislation relative to commercial and industrial matters, it was not until 1903 that a separate Department of Commerce and Labor was created by the consolidation and reorganization of several bureaus and offices, including the bureau of labor. Organized labor was, however, not contented with this recognition and

be imposed upon certain imports at the discretion of the President, thus putting it in his power to meet discriminations on the part of foreign countries. To assist the President in securing information with regard to this and other matters intrusted to his care, a board of three members was instituted. In 1916 Congress created a tariff commission of six members charged with the duty of making investigations and reports on the cost of production and recommendations for the revision of tariff schedules.

in 1913 secured the establishment of a Labor Department.

The Department of Commerce embraces a number of important bureaus. The bureau of the census has charge of the decennial census and owing to the extensive operations now included in that huge undertaking has a large permanent force engaged on statistical and related problems. The bureau of standards has the custody of the standards of measurement used in science and industry and is charged with the duty of constant study in that field. The bureau of foreign and domestic commerce collects statistics on foreign trade and studies the best methods to promote the foreign commerce of the United States; it collects and translates the tariff laws of other countries, publishes the reports of American consuls on commercial and other matters, and issues periodical reports on trade. It is furthermore "charged with the duty of making investigations into the various elements of cost of production at home and abroad in respect to articles subject to duty, comparative wages and cost of living, degree of control by business combinations and effect on prices, when required to do so by the President or either house of Congress." [1]

To the newly created Department of Labor, the bureaus of immigration, naturalization, and labor statistics, and also the children's bureau, were transferred. The duties of this Department comprise among other things "the gathering and publication of information regarding labor interests and labor controversies in this and other countries; the supervision of the administration of the act of Congress providing for the payment of compensation to artisans or laborers of the United States injured in the course of their employment; the supervision of the immigration of aliens, and the enforcement of the laws relating thereto and to the exclusion of Chinese; the direction of the administration of the naturalization laws; the direction of the work of investigating all matters pertaining to the welfare of children." The Secretary of Labor may act as mediator in industrial disputes or appoint commissioners of conciliation "whenever in his judgment the interests of industrial peace require it to be done."

[1] The Department of Commerce includes also the bureaus of lighthouses, fisheries, and navigation, the coast and geodetic survey, and the steamboat inspection service.

The National Postal Service[1]

Post-offices and post-roads and the transmission of mail may be properly considered in relation to the power of the federal government to control interstate commerce, although a special warrant for this branch of administration is contained in a separate clause of the Constitution. Under the Articles of Confederation, Congress merely had the power to establish and regulate the postal business from one state to another; but in order to facilitate the increase of intercourse throughout the nation, the power of managing not only the interstate mails, but the transmission of all mail matter whatsoever, was vested in Congress.

Those who hold to a strict interpretation of the Constitution contend that the power to establish post-offices and post-roads means only the right to direct where post-offices shall be maintained and on what roads mails shall be carried; but in practice, it has been shown that the power includes the right to construct buildings; and Story declares that there is no reason why Congress could not build and operate roads for the purpose of transmitting mails. "If it be the right and duty of Congress," he asks, "to provide adequate means for the transportation of the mails wherever the public good requires it, what limit is there to these means other than that they are appropriate to the end?"[2] Professor Burgess, on the other hand, holds that it is not settled law that the government may build, buy, and own railroads, or make the telegraph business a governmental monopoly.

The transmission of mail matter is exclusively vested in the federal government — that is, Congress can prohibit its carriage by private companies. The question as to what can be properly

[1] Congress had full power to regulate commerce with the Indians, but until 1871 it was the policy to deal with them as tribes by means of treaties. Since that year federal relations with the Indians have been conducted by the President and Congress through agreements and contracts. Those Indians who have left their tribes and settled down like white inhabitants are recognized as citizens, but those who remain with their people are not citizens. The total Indian population according to the census of 1900 was 266,760, a decrease of over 6000 since 1890. The figures of 1908, however, show an increase to 300,412. Most of these Indians reside in reservations, of which there are about 140. Supervision of the Indians is vested in the bureau of Indian affairs in the Department of the Interior.

[2] *Commentaries*, Vol. II, sec. 1141.

regarded as mail matter has been answered by the Supreme Court to the effect that it is limited to letters, papers, and other things which were commonly reckoned as mail at the time when the Constitution was framed.[1] Under this power to regulate the transmission of mail matter, Congress may exclude from the mails obscene, lewd, and lascivious literature or matter relating to lotteries,[2] but it cannot prohibit the carriage, by private companies, of any matter which it may so exclude.[3]

Under this general power to establish post-offices and post-roads, the federal government has built up a vast and complicated system. We began in 1789 with 75 post-offices, or one for every 50,000 persons in round numbers, and at the close of the nineteenth century there were more than 70,000 post-offices,[4] or one for about every 1000 inhabitants. The postal charges in 1792 ranged from six cents for a single sheet transmitted thirty miles to twenty-five cents for the same carried more than 450 miles. To-day an ordinary letter may be sent from Maine to Manila or from San Francisco to London or Berlin for two cents.[5] In the first year of its existence under the Constitution, the Post-Office Department received $37,000 and expended $32,000; in a little more than one hundred years the postal receipts and expenditures amounted to more than $200,000,000. Not being a profit-making but a public service agency its expenses often exceed its income.

The post-office not only carries letters, papers, post-cards, and parcels limited in size; it transmits money also. The registry service was established by Congress in 1855; and it is now possible for any one, by the payment of ten cents in addition to the regular postage, to secure the registration of a letter at every point in its journey, a return receipt from the person to whom it is sent, and an insurance up to the value of $50 — a system practically guaranteeing the proper delivery. In 1864, Congress established post-office money orders, by which payment to the addressee at the other end of the line is absolutely guaranteed and practically every possibility of loss obviated.

[1] *Ex parte* Jackson, 96 U. S. R., 727. [2] *In re* Rapier, 143 U. S. R., 110.

[3] Except, of course, so far as interstate commerce is concerned; but here a question as to freedom of the press might arise.

[4] Post-offices are graded into classes on a basis of receipts.

[5] The one-cent post-card was introduced in 1872.

In order to encourage the establishment of newspapers and their circulation among the people, Congress from the foundation of the government made especially low rates for the transmission of printed matter. For a long time a bulk rate of one cent a pound was charged for periodicals entered at the post-office as second-class matter, a rate which, it was claimed, was far below the actual cost of the service rendered and responsible for the large deficits which frequently occurred in postal finances. An agitation therefore arose in favor of an increase in the postal rates on newspapers and periodicals, but naturally it was vigorously opposed by publishers. It was alleged that the cost of transportation was excessively high on account of the unbusinesslike contracts which the government made with the railways.

The contest over increased rates for newspapers and periodicals culminated in 1917 in an amendment to the War Revenue Act raising the second-class mail charges. This law contained three significant provisions: (1) it increases the rates on second-class publications by a gradual process until by 1921 they are to range from two to ten cents per pound; (2) it bases the carriage of second-class mail on the zone system prevailing in the parcels post division, varying the rate according to the zone; (3) it lays a special postage rate on periodicals on the basis of the advertising carried when the advertisements exceed five per cent of the paper. Special rates are fixed for religious and educational publications not conducted for profit.

This measure while under consideration in Congress was sharply attacked on behalf of newspapers and periodicals. It was urged that it was a violation of the ancient American tradition of a free press as the bulwark of our liberties, and maintained that an increase would not be necessary if the post-office were efficiently conducted. Perhaps the most powerful argument was to the effect that the zone system would curtail the national circulation of national magazines and thus tend to the cultivation of localism and provincialism. All of the criticism was frankly faced by Mr. Kitchin, chairman of the ways and means committee in charge of the bill. He characterized the plea that cheap newspapers and magazines spread education as "hypocritical," adding: "If it is to educate the people, why is it that they charge from five to eight times as much to send a

little Webster spelling book or a dictionary or a grammar or geography to the little school children throughout the United States? Is that not for the spread of intelligence?"

The development of free delivery has been one of the most remarkable features in the evolution of our postal system. In 1863 it was established in all cities having at least 50,000 inhabitants, and it is now extended to cities having 10,000 inhabitants and in some cases even a much smaller population. In 1885 a system was introduced by which immediate "special" delivery on receipt at the post-office of the addressee can be secured by the payment of ten cents, in addition to the postage.

A third branch of postal delivery has now been instituted for country districts. This "rural free delivery service" began experimentally in 1897 with an appropriation of $40,000 and the establishment of forty-four routes. The expenditure for the fiscal year, ending June 30, 1897, was only $14,840, but within ten years the amount was more than $34,000,000, and there were in operation in that year 39,516 routes, distributing nearly two billion pieces of mail to more than 18,000,000 people residing in rural districts.

The incidental effects of this rural service have been of great importance, for, in addition to relieving the tedium and isolation of country life, it is a powerful factor in the improvement of public roads. The Post-Office Department is steadily insisting that the routes covered by rural delivery shall be maintained in good condition throughout all the seasons of the year, and in response to this pressure, state legislatures are increasing their appropriations for the building and improvement of highways.

Although Congress had early provided for the sending of books and small parcels of merchandise by mail, the restrictions were so narrow and the rates so high as to lead to a demand for the establishment of a special system, a "parcels post." This reform was long resisted by the express companies and by country merchants who feared that such a system of cheap transportation would enable the great department stores in the cities to undersell them. It was not until August, 1912, that Congress was induced to establish a domestic parcels post system. The law, which went into effect in January, 1913, fixed the weight and size of articles which might be carried, named the classes of goods

[1] Reinsch, *Readings*, p. 385.

which could be accepted at the post-offices under the law, and provided for laying the country out into zones and the establishment of specified rates according to distance and weight. Although the system thus set up was cumbersome and in many ways narrower in its range than the parcels post of other countries, it was regarded as a considerable achievement and the beginning of an extensive public transportation system.

Another function generally performed by the post-office in foreign countries is that of acting as a savings bank receiving deposits of money up to a certain amount and paying interest thereon. In order to encourage thrift and secure absolute safety for the savings of the small depositors, it was proposed several years ago to establish such a postal institution in the United States. The system was recommended by the Postmaster-General in his *Report* of 1908, in which he called attention to the fact that more than $3,600,000,000 was deposited in private savings banks throughout the United States. He urged that inasmuch as there were at least thirty-two states inadequately supplied with such concerns, not less than half a billion dollars was kept in hiding — a sum which could be brought into circulation through the agency of postal savings banks. As an evidence of the demand for this new institution, he cited the fact that American citizens during the previous year bought no less than $8,000,000 worth of postal orders payable to themselves, in order to secure safety for their money. Inasmuch as both parties had favored postal savings banks in their platforms of 1908, Congress took the matter up and by an act of June 25, 1910, the establishment of the system was authorized. Tentative experiments were made at a few post-offices, beginning in January, 1911, and the number of depositories was rapidly increased. The depositor in the postal savings bank is paid a low rate of interest (2 per cent), but he may exchange his deposits for gold bonds bearing $2\frac{1}{2}$ per cent interest. A part of the money so deposited is kept by the government in reserve and the balance is deposited with state or national banks which furnish certain securities and pay a rate of $2\frac{1}{4}$ per cent interest. The issue of interest-bearing bonds to depositors, it should be pointed out, is not obligatory, but depends upon certain conditions in the Treasury administration.[1]

[1] *American Year Book*, 1910, p. 328

The Post-Office Department

The Post-Office Department is a vast business concern charged with the supervision of an army of employees, some stationed in Washington and others scattered throughout the United States — in the thousands of post-offices and on the railway trains and other vehicles for mail transmission. The direction of affairs is vested in the Postmaster-General, who appoints departmental employees under the civil service rules,[1] manages postal finances, and hears appeals from subordinates. The Postmaster-General has four assistants, each of whom is responsible for one of the great branches of the postal service. The first has charge of appointments of postmasters, the establishment and discontinuance of offices, the adjustment of salaries and allowances for rent, clerk hire, and other expenses, and the city delivery service. The second assistant looks after all matters pertaining to the transportation of mails; appointments to the railway mail service; authorization of transportation by railways and other carriers; the making of contracts for carriage; the inspection of the carrying service; and the equipment of the service with the devices necessary for the conduct of its business. The third assistant is the finance officer of the Department, and he is in charge of the accounts, the issue of stamps and money orders, the registry system, and classification of mail matter. The fourth assistant superintends the divisions of rural delivery, supplies, dead letters, and topography. The administration of the post-office is greatly hampered by the fact that Congress controls rates and locates buildings, under the pressure of "politics," often with slight regard for economy or efficiency.

The postal authorities possess the power to exclude from the mails the letters and papers of persons and corporations practising fraud and deception, and also the power to prohibit the use of the mails for matter tending to encourage crime and immorality. When any person attempts, by fraudulent methods, to procure money or property through the mails, the postal authorities simply withdraw the privileges of the mails absolutely. This is

[1] By an executive order, March 31, 1917, all future vacancies in first-, second-, and third-class post-offices are to be filled by persons who pass civil service examinations.

done by instructing the postmaster at the place where the fraud is practised to stamp on all letters addressed to the person in question the word "fraudulent"; and return them to the writers if there is a return card, or to the Dead Letter Office. The Post-Office Department employs inspectors to conduct investigations into the misuse of the mails, and make reports to the Postmaster-General. These reports are the principal evidence upon which "fraud orders" are based. In practice the postal authorities serve notice on persons charged with abusing mail privileges, and inform them of the nature of the accusation. If an accused wishes to make defence, he must go to Washington and present his case. It has been uniformly held by the courts that the decision of the Postmaster-General on questions of fact in fraud order cases is not subject to judicial review.[1] The Court, however, will review the question as to whether a particular scheme is fraudulent.

The exercise of this large power has been entirely reprobated by many champions of individual liberty, who hold that it is not the business of the government to act as the paternal guardian of the citizens, protecting them from their own folly against the machinations of patent medicine fakirs and "get-rich" swindlers; or in guiding them as to the proper literature for the good of their morals. On the other hand, it is asked, with a good deal of plausibility, whether the government should permit the use of the mails by fraudulent concerns, and thus become a party to the deception of innocent persons.[2]

Under the provisions of the Espionage and Sedition acts the postal authorities were empowered to close the mails to newspapers suspected of "seditious" tendencies and the mail of any person whom the postal agents "distrusted" was opened and read. A strict censorship of the mails was created under a censorship board.

[1] *Readings*, p. 204.

[2] For example, a few years ago a company in New York began to advertise fountain pens at $2.50 apiece, and promised at the same time to employ every purchaser of a pen at $8 a week in letter-writing. "It was an endless chain scheme, growing constantly wider. All revenues were derived from the sale of the pens. This inverted financial pyramid was not thought stable by the post-office people, and the concern was put out of business by a fraud order in October, 1902, after having secured 19,000 patrons." Reinsch, *Readings*, p. 392.

CHAPTER XX

NATIONAL RESOURCES

The Federal Land Policy

THE United States at the close of the War for Independence possessed an enormous domain of unsettled lands beyond the Alleghanies, and from time to time new areas have been added by purchase and conquest.[1] It is estimated that the United States has possessed at one time or another a public domain of no less than 2,825,000 square miles — an area more than ten times the size of the German empire and more than twenty times the size of Great Britain and Ireland. In other words, over two-thirds of the total continental area of the United States, including Alaska, has been at some time during our history public property. In 1860 we had a public domain of 1,055,911,288 acres, and in spite of the enormous grants which have been made to railway companies, corporations, and private persons, the United States possessed in 1909 a national estate of 731,354,081 acres.[2]

The history of the disposal of our great domain forms one of the most striking and important chapters in the history of the United States — a chapter which is unhappily marred by a record of wasteful methods, lack of foresight, political corruption, and fraudulent transactions. This chapter also contains a record of the peaceful conquest and settlement of the Great West

[1] In addition to the lands already granted to private persons, there were large public domains in most of the territorial additions to the United States. Inasmuch as Texas had organized an independent government and had won recognition as an independent commonwealth before admission to the Union, it had already made provision for the public lands and was allowed to retain them. The acquisition of Hawaii, Porto Rico, and the Philippine Islands in 1898 brought very little additional public land to the federal government, as most of it had already been granted away to private persons.

[2] Insular possessions are not included in this estimate; but Alaska is. *Report of the Secretary of the Interior*, 1909, p. 7. Of course Alaska has been added since 1860.

by tens of thousands of hardy pioneers who built their prosperous homes upon the broad acres sold to them at a low price by the federal government.

In the beginning of our history, Congress made no attempt to dispose of the western lands in small lots to actual homestead-seekers. On the contrary, the government decided to sell the land as expeditiously as possible "for the common benefit of the United States" — that is, to extinguish the public debt; and accordingly large quantities were sold on contract, principally to speculative land companies, which in turn subdivided and sold in small lots. At length, in 1800, the government began a new policy of offering for sale on credit portions of the public domain in lots small enough to encourage entry and settlement by home-seekers; and in 1820 a system of cash sales was adopted, and purchasers were allowed to buy plots of any size.

The Republican party, in its platform of 1860, protested against a land policy "which regards the settlers as paupers or suppliants for public bounty"; and demanded the passage of a complete and satisfactory homestead measure. In 1862, Congress complied with this demand by passing the Homestead Act, which reserved the arable land for settlers and provided that any head of a family might secure a quarter of a section of land, that is, 160 acres, by residing on it for a period of five years.[1]

In spite of these attempts to reserve the public lands for bona-fide home-seekers, enormous areas have been secured by land companies, either by the purchase of the small grants made to private parties or by fraud. "Our public lands, whose highest use is to supply homes for our people," said President Roosevelt, "have been and still are being taken in great quantities by large private owners to whom home-making is at the very best but a secondary motive, subordinate to the desire for profit. To allow the public lands to be worked by the tenants of rich men for the profit of the landlords, instead of by freeholders for the livelihood of their wives and children, is little less than a crime against our people and our institutions. The great central fact of the public land situation . . . is that the amount of public land patented

[1] This act, however, was only supplementary to the preëmption system (1841 to 1891) according to which the head of a family might enter a quarter of a section by paying $200 and living upon it for a period of six months. Under the act of 1862 each homestead-seeker had to pay a fee of $40

by the government to individuals is increasing out of all proportion to the number of new homes." [1]

The public lands which have not been granted to land companies and to private persons have been disposed of in several ways.[2] In the first place, whenever a new state has been admitted to the Union it has received from the federal government a large portion of public domain within its area. Previous to 1850, it was the practice of the federal government to give to each state one thirty-sixth of the public lands within its borders for school purposes; and since 1850 the amount has been doubled.[3] In 1862 Congress granted to each state an amount of land according to its representation in Congress, to be devoted to the support of an agricultural college. In addition to these grants for educational purposes, Congress has given to the various states from time to time large areas to be used in the making of internal improvements.

Finally there are the concessions which have been made to railway corporations. It is estimated that under the various railway acts no less than 155,504,992 acres have been given to railways, and that more than one-half of this amount has been actually taken up by them. Most of this land, however, has found its way into the hands of homestead-seekers, for it has been the practice of the railways to sell their lands in small amounts at reasonable prices in order to encourage actual settlement. It has been profitable for them to develop population and industries along their lines; and they have accordingly used their grants for the rapid upbuilding of the West.[4]

While the government makes some distinction between ordinary arable lands and the lands which are valuable for timber, stone, and minerals, its policy from the very beginning has sacrificed the public domain very largely to prospectors and speculators. Congress has provided that the timber lands open for

[1] The Annals of the American Academy of Political and Social Science, Vol. XXXI, pp. 8–9.

[2] Large grants were made to the soldiers of the Revolutionary and Mexican wars.

[3] The six states admitted in 1890–91 were given considerably more than one-eighteenth of the public lands within their borders.

[4] Reference: J. B. Sanborn, *Congressional Grants of Land in Aid of Railways*, University of Wisconsin Publications (Economics), Vol. II, No 3.

entry must be sold only in small lots to single persons or companies for their respective benefit, but as a matter of fact the entries made by private persons rapidly pass into the hands of large timber companies. A bare list of the timber and land frauds which have been unearthed by the government would fill a volume of no mean proportions. Mineral lands have been likewise disposed of ostensibly to private individuals in small lots, but in actual practice to large corporations.

The reckless and notorious waste of our rich mineral resources was long a standing disgrace to the federal government. President Cleveland in his message of 1886 declared that "the object of the laws was perverted under the system of cash sales from a distribution of lands among the people to an accumulation of land capital by wealthy and speculative persons." Twenty years later, President Roosevelt, in his message of February 3, 1907, called attention to the waste of our mineral resources, and recommended legislation providing for the separation of the title to the surface of the land from the title to the underlying mineral fuels, in order that the latter may be kept for public benefit, even if the former is sold. In his report for the year 1908, the Secretary of the Interior said: "It is most earnestly to be hoped that Congress at this session will consider favorably the pending measure which has for its purpose the segregating of the coal from the surface and the sale or lease of the coal in such quantities as will permit its development in accordance with the needs of the country, and in a great measure prevent private interests from either monopolizing or holding for speculative purposes the great fuel deposits remaining in the public domain. The pending bill provides for alternate methods of sale and lease, so that the system best adapted to any section of the country may be used."[1]

The administration of the public lands is in charge of the commissioner of the general land office (Interior Department) who supervises their survey and sale. For the purpose of administration the states and territories having considerable public domain are laid out into districts, in each of which there is a local land office in charge of registers and receivers, who dispose of public lands under the laws and receive the funds accruing from these sales. Under an appropriation of Congress which went into effect on May 27, 1908, the force of special agents in charge

[1] Now enacted into law. Below, p. 410.

of the public lands was greatly increased for the purpose of more carefully policing the public domain and seeing that fraudulent land transactions were prevented.[1]

The Conservation Movement

Under the historic land policy sketched above, little or no thought was taken of the ultimate result, as the nation's heritage in lands, forests, and minerals was being bartered away to a considerable extent to shrewd and enterprising fortune hunters — to say nothing of the enormous areas that have been actually stolen. It is true that the policy of rapid alienation has been the chief, and to a large extent necessary, factor in the rapid development of the West, but nevertheless the Hon. Theodore Burton spoke correctly when he said in a letter to President Roosevelt in 1907:—

> Hitherto our national policy has been one of almost unrestricted disposal of natural resources, and this in more lavish measure than in any other nation in the world's history; and this policy of the federal government has been shared by the constituent states. Three consequences have ensued: First, unprecedented consumption of natural resources; second, exhaustion of these resources to the extent that a large part of our available public lands have passed into great estates or corporate interests, our forests are so far depleted as to multiply the cost of forest products, and our supplies of coal and iron are so far reduced as to enhance prices; and third, unequalled opportunity for private monopoly, to the extent that both federal and state sovereignties have been compelled to enact laws for the protection of the people.[2]

We have in fact arrived at a point where the exhaustion of some of our important natural resources is approaching, if the old wasteful methods of exploiting them are allowed to continue; and the realization of this fact has made the conservation and right use of our natural opportunities one of the most vital ques-

[1] During the fiscal year ending June 30, 1908, a little more than 19,000,000 acres of public lands were entered; the total cash receipts from the disposal of lands during that year were about $12,500,000, which netted the treasury a balance of a little more than $10,000,000; during that year also many additional forests were created, making a total forest area of 167,976,886 acres.

[2] *Proceedings of a Conference of Governors*, p. viii (Official Report).

tions to be solved by the present generation. Indeed, as President Roosevelt put it, "the conservation of our natural resources and their proper use constitute the fundamental problem which underlies almost every other problem of our national life."

This issue was first seriously brought to the attention of the general public by President Roosevelt in his numerous addresses; and a practical step toward the solution of the problem was taken by him in the appointment, in 1907, of the Inland Waterways Commission to investigate and recommend a full and comprehensive plan for the development and utilization of the water resources of the country. He took the second important step in calling a Conference of Governors at the White House on May 13–15, 1908. At that meeting of state executives, facts regarding our natural resources were presented by experts; methods of educating public opinion were considered; and many plans by which conservation could be best accomplished were suggested. All during Mr. Roosevelt's administrations the subject was widely agitated, the President and the Forester, Mr. Gifford Pinchot, taking the lead.

In Mr. Taft's administration this agitation bore fruit in several important acts of Congress. Among them were: (1) the act of June 22, 1910, permitting agricultural entries on coal lands and the separation of the surface from the coal beneath; (2) the act of June 25, 1910, authorizing the President to reserve water power sites on the national domains; (3) the act of February 24, 1911, authorizing the Secretary of the Interior to lease water power sites on reclamation projects; and (4) the act of March 1, 1911, providing for coöperation between the federal and state governments in forest fire prevention. In Mr. Wilson's administrations, the legislation dealing with national resources pertained to the improvement of administration rather than to any radical extension of principles. Perhaps the most noteworthy act was the law of October 20, 1914, authorizing the Secretary of the interior to lease coal lands in Alaska under certain restrictions. Large appropriations were made for the purchase of forest lands to be added to the national domain. On February 25, 1920, an important act for leasing coal, oil, phosphate and gas lands in the public domain was passed — a vital and fundamental measure of conservation based on modern ideas.

The Soil

The fundamental resource of the country is the soil. It was said by James J. Hill, in an address before the first Conference of Governors, that "nearly 36 per cent of our people are engaged directly in agriculture. But all the rest depend on it. In the last analysis, commerce, manufactures, our home market, every form of activity, run back to the bounty of the earth by which every worker, skilled and unskilled, must be fed, and by which his wages are ultimately paid."[1]

While we had at our disposal vast areas of virgin soil, we took it for granted that agriculture could take care of itself and that manufacturing alone needed our best energies and skill. During the pioneer days, the frontiersmen cleared away forests for farms, and after getting what they could out of the land, abandoned it, moved forward, and repeated the process. That the application of science to the abandoned areas would have renewed the bounty of the soil did not occur to the pioneers, and it was only natural that the refinements of agriculture should have been neglected amid the rough struggles of the frontier.

As the tide of land-hunting pioneers swept westward it left behind it neglected and abandoned farms. All throughout New England and the eastern states there are deserted farm-houses falling into ruin, and vast areas once under cultivation are being overgrown with scrub. The rough-and-ready single-cropping system, the careless provisions for fertilization, the maladjustment in connecting the country with town markets, and the enormous charges for freight and express (due in many instances to watered stocks and monopolies) are conspiring to turn whole states into wildernesses. Society and science must cooperate with private initiative in restoring these regions to fertility and productiveness.

It is not only the methods of tilling which are causing this decline in fertility. The soil is also being depleted by natural causes, the principal one of which is erosion, or the sweeping away of the fertile surface into streams by means of torrential rains and floods. It is estimated that 1,000,000,000 or more tons of richest soil matter are annually carried into the sea by our

[1] *Proceedings of a Conference of Governors*, 1908, p. 72.

rivers.[1] Millions of acres, particularly in the South, have been rendered bare and useless for agriculture largely by this process. One of the principal means of stopping this wastage is the conservation of forests which help to regulate the flow of water.[2]

The federal and state governments at present do little directly to aid in preserving and improving the fertility of the soil; but the experiments in advanced methods of cultivation carried on by the Department of Agriculture,[3] the Experiment Stations, and state agricultural colleges, are doing much to show the farmers how to make the best use of their land and at the same time to conserve it for the use of posterity. Science will become the servant of agriculture as well as of industry.

While lending this aid to improving the methods of agriculture, the federal government is widening the public domain by reclaiming arid and semi-arid lands through gigantic irrigation undertakings. The Newlands Act of June 17, 1902,[4] authorized the Secretary of the Interior to undertake the work of reclamation on a large scale. The fund for the work consists of the proceeds from the sale of the public lands in certain states. The lands made available by irrigation are sold, in small tracts, to actual settlers, who pay the price in annual instalments, thus restoring to the reclamation fund the money that is laid out. It was estimated that the value of the crops in the irrigated districts in 1918 was about $100,000,000.[5]

The work is done by the Reclamation Service, which is in the Department of the Interior. Reservoirs, drains, canals, etc., are constructed by the government,[6] and from them the settlers can draw water by means of ditches to irrigate their farms. A large number of projects have been undertaken, all of them requiring engineering skill of a high order. One of the most interesting of these is the Shoshone project in Wyoming, which required the erection of a dam over 300 feet high.[7] The first

[1] *Proceedings of a Conference of Governors*, 1908, p. 78.

[2] *Readings*, p. 365.

[3] For the work of this important Department see Reinsch, *Readings*, pp. 401 ff.

[4] For speeches in Congress on this act, see *Readings*, pp. 66, 371.

[5] *Report of the Secretary of the Interior*, 1919, p. 98.

[6] Largely by contract.

[7] The Annals of the American Academy of Political and Social Science, Vol. XXXI, pp. 203–218.

seventeen years of the reclamation work resulted in making about 1,600,000 acres fit for settlement, out of which 1,120,000 acres were actually irrigated.[1]

Some of the states are also carrying on similar work. For example, Idaho has undertaken stupendous projects. It has constructed one of the largest irrigation canals in the world and rendered arable more than 200,000 acres of barren waste. It has entered into contracts for the construction of large storage reservoirs to control flood waters.

Mineral Resources

Among the most valuable of the natural resources and the most necessary in the present stage of civilization are the minerals. Coal and iron form the foundation of our industrial prosperity. In one respect, the minerals differ greatly in character from all other natural resources; they cannot be improved or renewed. This makes a proper use of them all the more imperative.

For a long time it was the policy of the federal government in disposing of agricultural lands to convey rights to any mineral deposits that might be found beneath with the right to use the surface of the land. On June 22, 1910, a new policy was inaugurated of separating surface claims from the mineral deposits. An act of that date permitted agricultural entries on coal lands on condition that the right to the coal be reserved to the United States and that the right to prospect for minerals be open to any one giving sufficient guarantees to protect the agricultural claimant. This idea was also incorporated in the land grants to two new states, Arizona and New Mexico, in 1910. On August 25, 1912, agricultural entries on oil lands were permitted under reservations with regard to oil and gas similar to those required in the case of coal.

The policy of leasing rather than selling outright public resources was given a great impetus by the Alaska Coal Leasing act of October 20, 1914, and the Potash Leasing act of October 2, 1917. The former authorized the Secretary of the Interior to lease coal lands in Alaska under certain restrictions laid down in the act. These restrictions pertain to the area to be leased,

[1] *Report of the Secretary of the Interior*, 1919, p. 94.

the royalties to be paid to the government, the length of the term of leases, and similar matters. Certain labor provisions are included, particularly, the requirement of the eight hour day for miners and the semi-monthly payment of wages. The Potash Leasing act likewise lays down explicit conditions as to operations on the lands. The principle of leasing was applied generally to coal, oil, gas, and phosphate lands in the public domain by a law enacted on February 25, 1920.

While giving attention to the control over coal lands still owned by the public, the federal government is devoting more and more consideration to conservation in the use of coal. The Secretary of the Interior has stated that approximately ninety per cent of the coal consumed in the average steam plant is lost. In other words only about ten per cent of the heat in the coal is actually transformed into energy and harnessed for use. An experienced authority makes a more conservative estimate in the following picturesque language: "Every fifth shovel full of coal that the average fireman throws into his furnace serves no more useful purpose than to decorate the atmosphere with a long black stream of precious soot."

In 1919 the Secretary of the Interior reported that in one plant visited by the engineers of his department a preventable waste of 40,000 tons a year was discovered. By changes in the admission of air to the furnaces and other methods the engineers in the Bureau of Mines were confident that they were able to increase the economy of coal in the ships operated by the Emergency Fleet Corporation by sixteen per cent, thus making six pounds of coal do the work of seven. Such an economy generally effected in the United States would produce an annual saving of coal equal to the annual consumption of France and Italy together. It is thus evident that by scientific research and experimentation, immense economies may be realized in fuel consumption.

This is "the age of oil" and the federal government has taken cognizance of the fact. The Geological Survey has for a number of years been busily engaged in classifying all of the public domain with reference to coal, oil, and other mineral resources. By July, 1918, at least 6,500,000 acres of land, deemed to be valuable for oil, had been reserved. Furthermore the Survey indicated that enormous petroleum reserves were available in the oil shale

deposits of Utah, Wyoming, and western Colorado. A great deal of this land was classified as oil shale land and reserved for oil development purposes.

In the production of phosphates the United States leads the world. It is estimated that in the Western States alone there is a supply sufficient to last the world at the present rate of consumption for nine hundred years. Most of it is on government land and much of it has been classified by the Geological Survey. In the matter of potash, the United States is by no means so fortunate. Continuous searches in recent years have however added largely to the known deposits in this country and since 1916, especially, large withdrawals and reservations have been made.[1]

Forests

In the forests we have natural resources that are highly valuable not only for their direct contribution to the welfare of the nation, but also for their indirect bearing on the preservation of some other resources, — the soil, water power, and waterways.[2] The primary use made of the forests is, of course, for the lumber supply, which is as necessary to us in our daily life as the various metals and minerals. But more than that, — the forests are necessary to preserve the fertility of the soil and to aid in the maintenance of natural waterways. They help to conserve the soil by absorbing moisture and compelling it to percolate under the ground instead of running off the surface. Furthermore, they check the water from rushing down in torrential streams, and thus prevent soil waste. They are essential for the preservation of water power and the development of waterways because they act as natural reservoirs and regulate the flow. By holding back moisture and giving it out gradually, they help to maintain a stable channel, thus preventing the drying up of streams in seasons of drought, and also checking floods at other times.

The conservation of national forests received special attention in Mr. Roosevelt's administration. The several steps in

[1] Some of the states, as Utah, also own mineral lands. They, too, are beginning to see the necessity of preserving them and are ceasing to sell them at ruinously low figures. The adoption of a leasing system by states owning mineral lands has also been advocated.

[2] *Readings*, p. 364.

this development are set forth in his *Autobiography*. Shortly after taking office in 1901, an extensive examination of the needs and conditions of the forestry service was made. The Bureau of Forestry was called upon to give technical advice and information on the subject. Experimental planting in the national forests was begun and special studies made with a view to developing the science of forestry. In 1905 the care of the national forests was transferred from the Interior Department to the Department of Agriculture and the United States Forest Service was created. By an act of the next year, all of the land found valuable for agriculture within the national forests was thrown open to settlement. The Forest Service established and enforced regulations favoring the settler as against the large stock grazer. In the summer of 1906 an order was issued compelling men who turned sheep and cattle to graze on the national forest land to pay for what they got. This order was bitterly opposed as infringing upon the old and established "rights" of the grazers who, from time immemorial, had freely used the public forest lands at will. Between 1906 and 1909 nearly half a million acres of agricultural lands within the national forests were opened to settlement.

In the meantime the area of forest lands was materially extended. This area reached its maximum in 1910 when the amount of forest land in public ownership was in the neighborhood of 172,000,000 acres. For a number of years the area had been increased by presidential proclamations, for the most part on the basis of preliminary examinations. In 1909 plans were undertaken for a thorough revision of the boundaries and since that time there has been a reduction in the area. This has been mainly brought about as a result of the careful study of the national domain and the reclassification of lands on the basis of their actual character. In 1919 the national Forester put the area as classified at approximately 150,000,000 acres.

Another phase of forest conservation was fire prevention. Mr. Roosevelt states that by 1908 the fire prevention work had become so successful that eighty-six per cent of the fires that did occur were held down to an area of five acres or less. In 1910, however, the area burnt over was over four million acres and the loss was about $26,000,000. In 1911 an appropriation for fire protection was made on condition that the states dupli-

cate the appropriation. The success that accompanied this plan is shown by the fact that in the year 1918–19 the federal government spent less than $100,000 while the coöperating states spent over $625,000. Still the fire losses are serious, amounting to 694,000 acres in 1918. The federal Forester attributes this loss to: (1) inadequate trails and roads, (2) insufficient fire fight forces, (3) lack of motor equipment, and (4) lack of an aroused public sentiment in matters of fire precaution and prevention.

It must be said, however, that the efficient use of the national forests is a problem that has not yet been solved in a satisfactory manner.

Public forests, after all, are but a small part of the timber resources of the country. Most of the forest land is in the hands of private companies and individuals. As the Secretary of Agriculture reported in 1919, "the greater part of the lumber annually produced is cut from private lands on which the appearance of new growth is at best a matter of accident, is likely to be long delayed, or may never occur. Without concerted action under public coöperation and direction, the problem will not be solved. Private initiative cannot be depended upon to secure the requisite conservation."

A most significant departure was made by the Appalachian Forest Reserve law in 1911 which provided for a large appropriation of funds "for the purchase of land for national forests on the watersheds of navigable streams." This makes possible federal conservation even in Eastern states where lands have never been owned by the federal government, and may mark the beginning of a national forestry system, although the measure was only accepted by states' rights advocates on the theory that the system was to be limited to the protection of navigable streams over which Congress has a certain dominion under its interstate commerce power. Provision was also made by this law for coöperation between the federal and state governments in protecting forests from fires.

Water Power

The Geological Survey of the United States has estimated that the water power in this country available for ultimate

development amounts to 54,000,000 continuous horse power.[1] At the same time it was estimated that the power that could be developed in the United States by all stationary, water, steam, and gas plants (excluding, of course, railways, automobiles, marine engines, etc.) was something over 30,000,000 horse power. The importance of water power development need scarcely be emphasized.

In 1906, Congress adopted a new policy in dealing with water power sites on the national domain. At the suggestion of the Forest Service it limited the grant of water power to a certain company to forty years, instead of granting the site in perpetuity. It required an annual rental by the company. By an act approved June 25, 1910, Congress authorized the President to withdraw from sale and entry public land for water power sites and other purposes. Mr. Taft acted promptly under this act and withdrew vast tracts of land containing valuable water power sites. By an act approved February 24, 1911, the Secretary of the Interior was authorized to lease any power site on a reclamation project for a term of years.

The reservation of power sites undoubtedly checked the development of water power by private initiative. For several years the disposal of power sites was the subject of continual strife in Congress. On the one hand there were those who believed that the government should build electric plants and operate them as government enterprises. On the other hand, there were those who thought that such sites should be quickly and cheaply disposed of by outright sale to private parties. In between stood a group of men who held the middle ground, namely, that Congress should encourage private initiative and at the same time prevent the exploitation of the public through speculation and inflation due to monopoly.

In 1908, President Roosevelt took the position that water power sites should be leased only on the rental basis. For ten years and more Congress wrangled over the subject. Fully seventy per cent of the water power of the country is in the Rocky Mountain and Pacific states. California, Washington, and Oregon, with small coal supplies, have great water power undeveloped. While Congress debated, millions of horse power went to waste in the tumbling rivers.

The government is much better qualified to develop our power

[1] *Report of the Secretary of the Interior*, 1919.

resources than any private individual or corporation. It can provide for comprehensive and coördinated action, having as its aim ultimate development rather than immediate profits. By doing the work it will confer upon the people many benefits besides the mitigation of floods and the deepening of navigable channels. Properly managed they should yield great revenues to be employed for social purposes.

Waterways

During the early period of our history, previous to the development of railroads, water transportation was of special importance. This led to the construction of numerous canals by the state governments and private companies. But after 1850 water routes fell into disuse, and transportation by rail supplanted transportation by water.

During the last decade, however, the problem of transportation has taken on a new aspect. At the present time our commerce is developing at a much greater rate than our railroad facilities, so that the proper care and utilization of our water routes has become a pressing need. Moreover, the presence of navigable rivers and canals acts as a regulator of railroad freight rates through competition. Finally water carriage is much cheaper than transportation by rail. The waterways of the United States have an aggregate length of between 55,000 and 60,000 miles, but only about half of the mileage is at present used for navigation. It is now proposed to render available new routes and to improve the old ones.

Congress has done much in the past in deepening rivers and harbors, but its work has been desultory and unsystematic, largely with a view to local and selfish interests.[1] Thus far there has been a lack of any definite and continuous plan; many separate projects have been undertaken and never carried to completion and vast sums have been spent on projects purely local in character, which are of but little value to the nation at large. The total amount appropriated by Congress for harbors and waterways from 1802, the date of the earliest appropriation, up to and including 1890 was $214,039,886. During the sixteen years from 1891 to 1906 the amount was $301,447,046.

[1] This has been a great source of jobbery and log-rolling.

During the last few years it has become recognized that comparatively little of lasting value can be accomplished unless a permanent plan is formulated, and purely local projects are disregarded. Evidence of a new policy in this regard appeared in the Rivers and Harbors act of 1917. This act created a federal waterways commission, to include at least one engineer from the Army and one expert hydraulic engineer. The duty of this commission is to bring into coöperative relation all of the bureaus and agencies of the federal government that have anything to do with waterways and water resources with a view to developing a comprehensive national waterways program "for the purposes of navigation and for every useful purpose." Another one of the duties of the commission will be to advise Congress as to the modification or discontinuance of any project relative to waterways development.

The Great War revived public interest in water transportation. The congestion on the railways once more pointed out the utility of waterways for the carriage of heavy freight. On both coasts port and terminal development received a decided impetus. Seattle, Portland, and Philadelphia took the lead in the construction of port improvement projects. All signs seem to point toward a better planning and coördination of rivers and harbors work than we have ever had in the history of the country.

CHAPTER XXI

THE GOVERNMENT OF TERRITORIES

The Power of the Federal Government

THE Constitution of the United States makes no express provision for the acquisition of territory, and at the time of the Louisiana purchase the question was raised whether the federal government had the power to buy that domain. President Jefferson at first doubted the constitutionality of the purchase, and in the summer of 1803 he wrote to Mr. John C. Breckenridge concerning the subject: "The executive in seizing the fugitive occurrence which so much advances the good of their country have done an act beyond the Constitution. The legislature, in casting behind them metaphysical subtleties and risking themselves like faithful servants, must ratify and pay for it, and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves had they been in a situation to do it." [1]

However, men who took a broader view of the matter claimed that there was full constitutional warrant for the action, inasmuch as the federal government enjoyed the undoubted right to acquire territory under the treaty-making power. Even Jefferson finally gave up the idea that it was necessary to amend the Constitution in order to acquire Louisiana, and later the Supreme Court held that, "the Constitution confers absolutely on the government of the Union the power of making war and of making treaties; consequently that the government possesses the power of acquiring territory by conquest or by treaty." [2]

Congress governs federal territory under that clause of the Constitution giving it power to dispose of and make all needful rules and regulations respecting the territory or other property

[1] *Works* (Ford ed.), Vol. IV, p. 500.

[2] American Insurance Co. *v.* Canter, 1 Peters, 511.

belonging to the United States. The conflict over the powers of Congress under this provision furnishes a long and stirring chapter in the constitutional history of the United States. During the first half of the nineteenth century, this conflict was waged over the question as to whether Congress could prohibit slavery in the territories. The pro-slavery wing of the Democratic party contended that the national legislature had no such power, and radical Republicans, on the other hand, maintained that it even had no right to permit slavery in the territories.

The whole matter of the power of Congress over territories was reopened in 1898, with the acquisition of our insular possessions, in the form of the somewhat striking question, "Does the Constitution follow the Flag?" The answer to this proposition is simple: the federal government cannot go anywhere or do anything except under some power conferred by the Constitution. But this leaves unsettled the problem of what provisions of the Constitution control the federal authorities in the government of territories. It requires no very subtle analysis to discover that certain clauses of that instrument are designed to limit the federal government within the states; but do all the provisions in behalf of private rights contained in the original Constitution, and especially in the first ten amendments,[1] run into the territories and control the federal government there? In his famous opinion in the Dred Scott case, Chief Justice Taney declared that they did, and hence that slavery could not be prohibited there because that would be depriving the slave-owner of his property without due process of law — a gross violation of the private rights guaranteed under the Constitution. Many years later the Supreme Court held that the Seventh Amendment required a unanimous verdict in common law trials, and controlled the legislation of Congress and territorial assemblies.[2]

A new aspect was given to this question when the Hawaiian Islands and the Philippines were acquired, because it was obviously impossible to apply there all of the elaborate principles of Anglo-Saxon jurisprudence laid down in the first ten amendments to the federal Constitution. In a series of Supreme Court

[1] See *Readings*, pp. 134–137.
[2] Springville *v.* Thomas, 166 U. S. R., 707, (1897).

decisions,[1] known as the "Insular Cases," many technical points are involved, but the upshot of them all is that the Constitution may be divided into two parts, fundamental and formal; that only the fundamental parts control the federal authorities in the government of territories; and that the Supreme Court will determine, from time to time, as specific cases arise, what parts of the federal Constitution are fundamental and what parts are formal.[2] Thus we may say, with a judge of the United States circuit court of appeals for California, that, for practical purposes, "the territories of the United States are entirely subject to the legislative authority of Congress. They are not organized under the Constitution, nor subject to its complex distribution of powers of government as the organic law, but are the creation exclusively of the legislative department and subject to its supervision and control. The United States, having rightfully acquired the territory and having become the only government which can impose laws upon them, has the entire domain and sovereignty, national and municipal, federal and state. It may legislate in accordance with the special needs of each locality, and vary its regulations to meet the circumstances of the people." [3] Under this liberal interpretation of the Constitution, Congress may establish and maintain practically any form of government in the insular territories which does not violate too grossly the political traditions of the American people.

In view of the fact that, ever since the campaign of 1900, the opponents of the American policy have demanded for the Porto Ricans and Filipinos either complete freedom or at least "self-government on the Principles of the Declaration of Independence," it seems worth while to examine briefly at this point the historical policy of the United States in the administration of the territories. The famous ordinance of 1787 for the government of the Northwest Territory provided that

[1] The following cases relate especially to the position of the new territories in our political system: Downs *v.* Bidwell, 182 U. S. R., 244 (1900); Dooley *v.* the United States, *ibid.*, 222; Dooley *v.* the United States, 183 U. S. R., 151 (1901); Pepke *v.* the United States, *ibid.*; Hawaii *v.* Mankichi, 190 U. S. R., 197; Dorr *v.* the United States, 195 U. S. R., 138; De Lima, *v.* Bidwell, 182 U. S. R., 540 (1900).

[2] See *Readings*, p. 375, for a succinct statement by Justice Day of the Supreme Court of the United States.

[3] Willoughby, *Territories and Dependencies of the United States*, p. 22.

Congress should appoint the governor, and fixed his property qualifications at a freehold estate of a thousand acres of land; the secretary and judges were likewise appointed by Congress and required to have certain property qualifications. For the time being, the governor and judges were to make the civil and criminal laws for the territory, subject to the approval of Congress. It was further provided that when the territory should have 5000 free male inhabitants, there should be instituted a representative assembly composed of delegates, each owning 200 acres of land, chosen by the voters of the territory, each possessing a freehold of 50 acres. To this representative assembly was added a legislative council composed of five members, (each with the property qualification of 500 acres of land freehold) chosen by Congress out of ten persons nominated by the representative branch. Thus in the beginning the federal government did not even give to territories inhabited principally by white citizens of the United States that complete autonomy and democratic form of government which many anti-imperialists would have conferred upon the insular possessions almost at the very outset of our administration.

This policy of keeping a firm control on the territories, with more or less modification, has been continued throughout our history. When the territory of Orleans was organized, in 1804, the executive power was vested in a governor appointed by the President and Senate, and the legislative power was given to the governor and a legislative council consisting of "thirteen of the most fit and discreet persons of the territory appointed annually by the President of the United States from persons holding real estate." It was not until the western territories were fairly well settled and somewhat experienced in the conduct of their own political affairs that they were given large powers of self-government on the basis of a widely extended franchise.[1]

The Government of Territories

I. With the admission of Arizona and New Mexico in 1912, the last of the continental domain of the United States was laid out into states, and the long history of conflicts over territorial and state organization brought to a close. There are,

[1] Willoughby, *Territories and Dependencies of the United States*, pp. 27–52.

however, two territories which possess governments modelled on those which were traditionally established for the "organized" territories of the continental domain. These are Alaska and the Hawaiian Islands.[1]

The first of these, Alaska, secured from Russia by purchase in 1867, remained under direct government from Washington until 1912, when Congress enacted a law providing for a senate and house of representatives, both elected by popular vote. The first session of this assembly was held in March, 1913, and among its early measures was a law granting suffrage to women. The powers of the legislature are defined by law and the executive authority is vested in a governor appointed by the President and Senate of the United States. Alaska, long regarded as a cold and barren waste of little political importance, has now come into considerable prominence on account of the discovery of immense coal areas, in addition to the precious metal regions. The proper treatment of federal domain in that territory and the provision of railway facilities for opening up the natural resources were problems of first-rate importance at Washington. Advocates of the conservation of the resources seek to avoid the wastes which occurred in disposing of the continental domain; and to escape monopoly they brought about government ownership of the important Alaskan railways.

The Hawaiian Islands were annexed by a joint resolution of Congress approved July 7, 1898; and their administration is based on the organic act of April 30, 1900, which erected them into a territory and created a complete system of government, going even into greater detail than in the case of Arizona and New Mexico. The provisions of the Constitution and laws of the United States, applicable to local conditions, were extended to Hawaii; and American citizenship was conferred upon all persons who were "citizens of the republic of Hawaii on August 12, 1898." The governor and secretary of Hawaii are appointed by the President and Senate. The legislature consists of a senate and a house of representatives, and the members of each are elected by popular vote. Every voter must be a male citizen of the United States twenty-one years of age and a resident of the territory of not less than one year's standing; he must be

[1] Willoughby, *Territories and Dependencies*. Each territory has a delegate in Congress who may speak but not vote.

duly registered and must be able to read, write, and speak either the English or Hawaiian language.[1]

II. The second group of territories are those acquired at the time of the War with Spain, namely, Porto Rico and the Philippines, both of which now have local representative assemblies. The possession of Porto Rico by the United States dates from the raising of the American flag on that island in July, 1898. For almost two years the new domain was governed under military authority, but on May 1, 1900, the organic act of Congress erecting civil government in the island was approved by the President.[2]

This act did not confer citizenship upon the inhabitants, but merely provided that they should be deemed citizens of Porto Rico and as such entitled to the protection of the United States. It was not until the passage of the new organic act of 1917 that the residents of Porto Rico were collectively admitted to American citizenship.

The chief executive officer of Porto Rico is the governor, who is appointed by the President and Senate of the United States for a term of four years.[3] There are also eight executive officers, — secretary, attorney-general, treasurer, auditor, commissioner of the interior, commissioner of education, commissioner of agriculture and labor, and commissioner of health — appointed by the governor of the territory.

Under the organic act of 1917, the legislature consists of two houses. The upper house, or senate, is composed of nineteen members elected for a term of four years. The lower house of the legislature consists of thirty-nine members, elected every four years under a franchise which gives the right to vote to every adult male who has satisfied the residence requirements.[4]

The new and more democratic form of government for Porto Rico created in 1917 was the outcome of a continued protest against the system established under the law of 1900, and

[1] This provision excludes most of the Chinese and Japanese inhabitants of the island, and since there is a decline in the number of natives, the political power is passing into the hands of the English-speaking inhabitants. Willoughby, *Territories and Dependencies*, p. 65.

[2] For an extract, *Readings*, p. 388.

[3] The supreme court is composed of five judges, likewise appointed by the President and Senate, and holding office during good behavior.

[4] See Organic Act of March 2, 1917.

constant friction between the elective branch of the legislature and the governor's council.

For example, in 1908, the long and persistent refusal of the executive council (then appointed by the President of the United States) to approve certain legislative projects adopted by the lower house so incensed that body that it attempted to block the budget and thus force a deadlock in the government. The dispute was carried to Washington, in 1909, and made the subject of special consideration by the Cabinet. The whole matter was then referred to Congress, and a law was passed providing that in case the lower house refused to pass the budget, the financial arrangements of the preceding year should be continued.

In 1916 the Democratic platform favored granting to Porto Rico and the Philippines the "traditional territorial government" accorded to the territories "since the beginning of our government." The result for Porto Rico was a new organic act which provided for an upper chamber elected by popular vote.

The problem of governing the Philippine Islands is infinitely more complicated than that of governing Porto Rico.[1] The Philippine archipelago embraces no less than 3141 islands and islets, among which Luzon, Mindanao, Samar, Negros, Panay, and Mindoro are the most important. In March, 1903, the total population amounted to 7,635,426, of which 461,740 were classified as "wild."

There are representatives of about thirty different tribes, speaking as many different dialects.[2] The civilized inhabitants of the islands are nearly all adherents of the Catholic faith, but they range in culture from educated and wealthy Spaniards to poor and wretched natives. It is small wonder, therefore, that the Congress has had great difficulty in devising a system of government that will meet the needs and aspirations of the proud and independent elements of the population, and at the same time guarantee security of life and property throughout the whole archipelago.

[1] For American policy in the Philippines, see *Readings*, p. 380. Also Kalaw, *Self-government in the Philippines*.

[2] *Census of the Philippine Islands*, Vol. II, p. 14–16. For a discussion of the non-Christian tribes, see Kalaw, chap. vii.

The Philippines were acquired under the treaty with Spain. The protocol suspending hostilities with that country provided that the United States should hold Manila pending the conclusion of a treaty of peace which should determine the disposition and government of the islands. The treaty, duly signed at Paris on December 10, 1898, contained the definite transfer of the archipelago to the United States, leaving the status of the islands to be determined by Congress.

The development of American government in the Philippines falls into four stages. (1) In the beginning, a considerable portion of the inhabitants were in revolt against American rule, and the islands were governed by the President under military authority. In January, 1899, a commission was appointed, to act in conjunction with Admiral Dewey and General Otis in extending American authority throughout the Philippines, and to investigate the whole problem of government there.[1] (2) On receiving the recommendations of this first commission, the President appointed, in March, 1900, a civil commission, with Mr. Taft at the head, to continue the work of establishing civil government which had already been begun by the military officers; and, in 1901, the President transferred from the military governor to the president of this commission all civil powers of the executive branch of the government in the provinces in which tranquillity was restored. Under this order, Mr. Taft was made civil governor of the Philippine Islands. (3) At length, in 1902, Congress passed an organic act for the Philippines, providing, among other things, that after the completion of the census and the pacification of the islands a legislative assembly should be erected. The third stage in the construction of the Philippine government was reached on October 16, 1907, when the first representative assembly elected in the islands under the authority of the United States was opened at Manila. (4) Under an act of Congress passed in 1916 the commission was supplanted by a senate elected by popular vote, except for a few members appointed by the governor to represent the non-Christian provinces.[2]

[1] The two reports of this commission, November 2, 1899, and December 31, 1900, are a veritable mine of information on Philippine conditions.

[2] See the valuable work by M. M. Kalaw, *Self-Government in the Philippines* (1919).

The executive branch of the Philippine government consists of the governor appointed by the President and Senate of the United States. The legislature consists of the senate, as mentioned above, and an assembly elected by the voters of those portions of the islands not inhabited by Moros or other non-Christian tribes. The franchise for voting is limited by somewhat complicated qualifications: every voter must take an oath of allegiance, and, among other things, he must be a property-owner, or a tax-payer, or able to read, write, and speak English or Spanish.

The question of the final disposal of the Philippine Islands has long been the subject of discussion. In 1900, the year following the ratification of the treaty with Spain, the Democratic party in its platform condemned and denounced the leaders of the Republican administration, for having placed the United States, "previously known and applauded throughout the world as the champion of freedom, in the false and un-American position of crushing with military force the efforts of our former allies to achieve liberty and self-government." The platform further favored "an immediate declaration of the nation's purpose to give to the Filipinos, first, a stable form of government; second, independence; and, third, protection from outside interference." Again, in 1912, the Democratic party favored an immediate declaration of the nation's purpose to recognize the independence of the Philippine Islands "as soon as stable government can be established." By the act of 1916 cited above (the Jones law) it was declared that it was the purpose of the United States to withdraw from the Philippines and to recognize their independence "as soon as a stable government can be established therein."

III. A third group of territories of the United States is composed of those which are governed directly by federal officers without the intervention of a legislative assembly in any form. It includes Guam, secured by the Spanish treaty in 1898, Tutuila and islets, acquired by settlement with England and Germany in 1899, the Panama Canal Zone, obtained by a treaty with the republic of Panama in 1904, and the Virgin Islands purchased from Denmark in 1917.[1]

[1] The Wake Island, Midway or Brooks Island, Howland and Baker Island and the Guano Islands are not under any organized form of government.

The government of the Panama Canal Zone, during the construction of the canal, was vested in the President of the United States, who created, by executive order, an isthmian canal commission to do the actual work of administration. Toward the closing days of the construction, by a law approved August 24, 1912, Congress provided that when the President thought the work sufficiently advanced toward completion he might abolish the commission, and authorized him thereafter to govern and operate the canal and govern the canal zone through a governor and such other persons as he might deem competent to discharge the various duties. The governor is appointed for four years by the President and Senate and all other persons in the zone government are appointed by the President or under his authority and hold office at his pleasure. Notwithstanding the agreement made by the United States in the Hay-Pauncefote treaty with Great Britain in 1902 to the effect that the canal should be open to all nations without discrimination, Congress, in the law mentioned above, provided that ships owned by American citizens and engaged in the coastwise trade should be exempt from tolls. Great Britain protested against this discrimination, and in 1914 Congress repealed the tolls exemption clause.[1]

The District of Columbia, in area about seventy square miles, was accepted, as the seat of the federal government, from Maryland by Congress in 1790.[2] Several experiments in the government of the municipality by mayor and council were tried, but none of them proved successful. At last, in 1874, Congress made a radical departure in the government of the city by passing an act destroying the last vestige of popular representation.[3] The legisla-

[1] The government of Samoa is in the hands of a naval officer stationed at Pago Pago on the island of Tutuila; this officer has full executive and legislative authority. Guam is likewise governed by a naval officer in charge of the naval station. The Virgin Islands under act of 1917 are under a governor chosen by the President.

[2] The district was originally ten miles square, lying on both sides of the Potomac River and including a small area granted by Virginia, but in 1846 the Virginia portion was returned to that state. The seat of the federal government was moved to Washington in 1800.

[3] The problem of negro suffrage was prominent in the District politics under an elective government, and was largely responsible for the drastic action of Congress in abolishing the council altogether. As a result the entire population is now disfranchised.

tive powers of the District are now assumed by Congress, which has by rule set aside certain days to be devoted to the business of the District. The executive power is given to a board of three commissioners — two civilians and one military officer — appointed by the President and Senate. This board enjoys not only large administrative powers, but also makes ordinances relating to public safety, health, and welfare.

The island of Cuba, while it may not be regarded as a dependency, is under the protection of the United States. In the joint resolution of Congress demanding the withdrawal of Spain in 1898,[1] it was specifically stated that the United States disclaimed any intention of exercising sovereignty, jurisdiction, or control over the island except for the pacification thereof; and it was furthermore asserted that when that task was accomplished the government of the island would be left to the people. However, in 1901, a provision, known as the "Platt Amendment," was incorporated in the army appropriation act, which directed the President to turn the control of Cuba over to the inhabitants as soon as they established a regular government and expressly recognized in their constitution the protection of the United States and the right of American intervention under certain circumstances.[2]

In the summer of 1906, an armed uprising was fomented by discontented natives, and after repeated appeals from American citizens in Cuba, the federal government decided to intervene. A division of the army was sent to the island, and the entire administration was assumed by Governor Magoon representing the authority of the United States. American occupation lasted until January, 1909, when the government was turned over to the native president and congress, duly elected in the preceding November.

[1] *Readings*, p. 378.
[2] See *Readings*, p. 379, for the circumstances.

PART III

STATE GOVERNMENT

CHAPTER XXII

THE CONSTITUTIONAL BASIS OF STATE GOVERNMENT

HAMILTON believed that contests between the state and federal governments would generally end in favor of the former, and that there was a greater probability of "encroachment by the members upon the federal head than by the federal head upon the members." Jefferson looked upon the national government as principally the agent of the states in the conduct of their foreign affairs; and in the early days of the republic it was quite common for men in politics to leave prominent places in the federal government to accept high offices in their respective commonwealths. When Mr. Jay, who had resigned the Chief Justiceship of the Supreme Court, was tendered a reappointment by President Adams, he replied: "I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess."

Obviously, fundamental changes have occurred in our federal system since Jay wrote these depreciatory words concerning the dignity of the federal judiciary. The Civil War and the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments have taken away from the states an enormous domain of power which they previously enjoyed. Our national government has risen in popular esteem; statesmen now look upon local politics principally as a means of advancement to federal honors; the growth

of national party organization has subordinated state to national politics, and the failure of state governments to remedy many of the abuses connected with trusts and corporations has led the people to turn to the national government for relief. The supremacy of federal law[1] and the growing practice of corporations and individuals to resort, whenever possible, to federal tribunals in the protection of private property rights, have given a weight to the national government which its founders had slight reason to suspect it would ever secure. Whatever view we may take of the old struggle over states' rights, the fact remains that in law and in political consciousness the nation is now first. The national government is not a light superstructure resting upon the solid foundations of state governments;[2] the national Constitution furnishes the broad legal basis for the whole system, for it is within the sphere marked out by that Constitution and guarded by the federal judiciary that commonwealth governments must operate.[3]

[1] See *Readings*, p. 140.

[2] It will be remembered that thirty-five of the forty-eight commonwealths composing the Union have been admitted by the national government, sometimes with conditions.

[3] A clear idea of the concrete nature of this control over state activities by the federal courts may be gained from the following summary by Professor R. B. Scott: "It has been held that state boards and commissions, attorneys-general and prosecuting attorneys, may be enjoined from putting into effect a schedule of railroad rates, or gas, telegraph, or stockyard rates, alleged to be invalid as working a deprivation of property without due process of law or otherwise violating the federal Constitution. State officers have been restrained from levying taxes on the ground that they were attempting to act without lawful authority. A cancellation or revocation of license to do corporate business because of the violation of state laws has been enjoined. The enforcement of state ordinances has been prevented and seizure of property under a dispensary law has been restrained. . . . Furthermore it is to be noted that in addition to the cases where purely negative control has been exercised, there are instances of the grant of positive remedies by the federal courts against state and local officers; *e.g.*, in compelling through writ of mandamus the levy of a tax to pay a judgment on township bonds. These cases have been confined to no locality; North and South, East and West have felt the heavy hand of the national government. Nor has such control been restricted to a single field of state law; criminal as well as civil liability to the state has been involved." "The Increased Control of State Activities by the Federal Courts," in the Political Science Review for August, 1909.

Fundamental Constitutional Limitations on State Governments

The boundaries and nature of this sphere of power reserved to the several commonwealths are to be understood by an examination of the fundamental limitations on state governments laid down in the federal Constitution,[1] and also the chief judicial decisions interpreting them in practice.

1. The first groups of limitations relate to the taxing power of the state. States cannot lay and collect imposts and duties upon exports and imports — that is, upon articles in the hands of any person who sends them to, or receives them from, foreign countries directly, — except to defray expenses incurred in the execution of inspection laws, and then only with the consent of Congress.

A duty upon imports, said the Supreme Court in the case of Brown *v.* Maryland,[2] is not merely a duty on the act of importation, but it is a duty on the thing imported as well. "When the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import and has become subject to the taxing power of the state; but while remaining the property of the importer in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition of the Constitution." [3] Thus foreign commerce is protected entirely from impediments which might be devised by state governments.

2. Analogous to this provision is the clause which forbids any state to lay a tonnage duty without consent of Congress. The word "tonnage" means the entire internal capacity or contents of a vessel or ship expressed in tons of one hundred cubical feet each. States may tax the ships of their citizens as property valued as such; but it is clear and undeniable, the Supreme Court has held, "that taxes levied by a state upon ships and vessels as instruments of commerce and navigation are within that clause of the

[1] *Readings*, p. 391.

[2] 12 Wheaton, 419.

[3] When any state, with consent of Congress, lays duties on imports or exports, the net proceeds of all such duties must be paid into the treasury of the United States.

instrument which prohibits the states from levying any duty of tonnage without the consent of Congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the state which levies the tax or to the citizens of another state, as the prohibition is general, withdrawing altogether from the states the power to lay any duty of tonnage under any circumstances without the consent of Congress." [1]

3. No state can lay a tax on the property, lawful agencies, and instrumentalities of the federal government or on federal franchises as such. This principle is not expressed in the Constitution, but it was derived, with his usual logic, by Chief Justice Marshall from the nature of the federal system itself. The power to create implies the power to preserve; the power to tax is the power to destroy, and if wielded by a different hand is incompatible with the power to create and preserve; therefore if the states could tax federal instrumentalities, they could destroy a union which was meant to be indestructible. According to this doctrine, states cannot tax branches of a United States bank, federal bonds, federal franchises, or by taxation "retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." [2]

The early doctrine that the states cannot in any way touch a federal instrumentality has been modified more recently to the effect that they cannot interfere with such an instrumentality in such a manner as to impair its efficiency in performing the function which it was designed to serve. A state, for example, cannot tax federal bonds, but it may tax the buildings and other property of a national bank chartered by the federal government. "It is manifest," said the Supreme Court, "that exemption of federal agencies from state taxation is dependent not upon the nature of the agents or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of the power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect.

[1] State Tonnage Tax Cases, 12 Wallace, 204.
[2] 4 Wheaton, 316; Weston *v.* Charleston, 2 Peters, 444.

It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of federal powers." [1]

4. In the exercise of its police power and power of taxation a state may not seriously interfere with interstate commerce; [2] but it may pass laws relative to matters which are local in character, even though they do affect in some way such commerce. For example, the Supreme Court sustained a law of Kentucky providing for the inspection of illuminating oils and imposing a penalty upon persons selling oil branded as unsafe by state inspectors — this law being in the interests of public safety — although it certainly interfered with the right of citizens of other states to sell oil freely in that commonwealth.[3] Likewise a quarantine law of the state of Louisiana was sustained, although it incidentally restricted freedom of commerce. States may prohibit the running of freight trains on Sundays; forbid the employment of color-blind engineers on interstate as well as local trains; require the heating of cars; regulate speed within city limits; and compel the guarding of bridges and the protection of crossings even though such provisions affect interstate as well as local business.

State actions which constitute an invasion of federal power may likewise be illustrated by concrete cases. A law of Minnesota requiring the inspection of all meat twenty-four hours before slaughtering, designed in the interests of pure food, was declared invalid, because it necessarily prevented the transportation, into that commonwealth, of meats from animals slaughtered in other states where, of course, no such inspection could be provided.[4] The state of Illinois passed an act regulating the making of railway rates within the state; but when it attempted to apply the rule to a shipment beginning in Illinois and ending in another state, the Supreme Court of the United States by proper process interfered, and declared that the regulation of interstate commerce from the beginning of a shipment to its end was confided exclusively in Congress.[5]

[1] Railroad Company *v.* Peniston, 18 Wallace, 5.
[2] See above, chap. xix.
[3] Patterson *v.* Kentucky, 97 U. S. R., 501.
[4] That is, by Minnesota. Minnesota *v.* Barber, 136 U. S. R., 313.
[5] 118 U. S. R., 557.

Again, a state cannot impose a tax upon all freight carried by a railway,[1] but it can tax the franchise of a railway company, measuring the extent of its value by the receipts, including the receipts from interstate and foreign commerce.

Another important question relative to interstate commerce was raised by state laws prohibiting the manufacture and sale of intoxicating liquors. In 1873–88, Iowa passed such laws, and the Supreme Court held them void, in so far as they prohibited the sale, by the importer, of liquor brought in from other states.[2] In 1890, Congress passed an act providing that fermented and other intoxicating liquors transported into any state or territory should be subject (as to sale) to the operation of the laws of such state or territory to the same extent and in the same manner as though they had been produced there. In other words, the Supreme Court held that prohibiting the importation of intoxicating liquor for sale was an interference with interstate commerce —a subject referred by the Constitution to the federal government; and Congress permitted the state to make a regulation of such commerce. This law was upheld, however, by the Supreme Court in a decision in which it was stated that in so legislating Congress had not attempted to delegate to a commonwealth the power to interfere with interstate commerce, but had simply made a uniform regulation under its power to control this commerce.[3]

5. The state has practically no power over the monetary system. It may charter and regulate state banks, but it cannot coin money, emit bills of credit, or make anything but gold and silver coin [4] legal tender in the payment of debts. It may, however, authorize a state bank or state banking association to issue notes for circulation, but the exercise of this power is practically prohibited by the act of Congress, passed in 1866, laying a tax of ten per cent upon such notes. The effect of this act was to make it impossible, on account of the weight of the tax, for state banks to issue notes at all. The law was upheld by the Supreme Court of the United States for the reason, among others, "that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers." [5]

See *Readings*, p. 348.

[2] Leisy *v.* Hardin, 135 U. S. R., 100.

[3] *In re* Rahrer, 140 U. S. R., 545.

[4] Coined by the federal government.

[5] Veazie Bank *v.* Fenno, 8 Wallace, 533.

6. The original Constitution also contains some fundamental limitations on the power of states over criminal legislation. It provides that no state shall pass any bill of attainder — that is, a legislative act which inflicts punishment upon some person without ordinary judicial trial. This device had been frequently used for partisan purposes in the British Parliament, and the framers of the Constitution therefore desired to prevent such an abuse of legislative authority in the United States. No state can pass an ex post facto law — that is, one which imposes a punishment for an act which was not punishable when committed; or imposes additional punishment to that prescribed when the act was committed; or changes the rules of evidence so that different or less testimony (to the serious disadvantage of the accused) is sufficient to convict him than was required when the deed in question was committed.[1] This limitation on the states was designed to protect citizens from punishment by legislative acts having retrospective operation, and applies only to criminal legislation.[2]

7. To protect citizens in their property rights the Constitution provides that no state shall pass any law impairing the obligation of contracts. The obligation of contract is the body of law existing at the time a contract is made, defining and regulating it, and making provision for its due enforcement. For example, one Crowninshield, on March 22, 1811, gave a note to one Sturges; and shortly afterward the state of New York, in which the note was dated, passed a bankruptcy law under which Crowninshield became a bankrupt, and by paying Sturges a portion of what he owed, claimed the right to be discharged from all of the remainder. This law with reference to all debts contracted *before* its passage was declared invalid by the Supreme Court as impairing the obligation of contract.[3]

The term contract is used in this clause with a far wider meaning than in ordinary private law. It means "a legally binding agreement in respect to property, either expressed or implied, executory or executed, between private parties, or between a commonwealth and a private party or parties; or a grant from one party to another; or a grant, charter, or franchise, from a common-

[1] Cummings *v.* Missouri, 4 Wallace, 277.
[2] Calder, *v.* Bull, 3 Dallas, 386.
[3] Sturges *v.* Crowninshield, 4 Wheaton, 117.

wealth to a private party or private parties." [1] This wide interpretation of the term has given the clause a particular social and economic significance, because it has been applied to the protection of the franchises, charters, and privileges secured by private corporations from state legislatures. The Supreme Court, for example, held that a charter secured by Dartmouth College from King James constituted a contract with that corporation which the state was bound to respect on securing its independence, and that a law of the state of New Hampshire designed to control the college and its funds was an impairment of the obligation of that contract.[2] Again in the case of the Bank of Ohio *v.* Knoop, [3] the Supreme Court held that a charter to a bank in which the state agreed to tax the corporation at the rate of only 6 per cent on its dividends was a contract, and that a subsequent law of the state raising the rates on the bank so chartered was an impairment of the obligation of contract.[4] Under a strict application of this principle, a state legislature having once granted away special privileges to corporations would be bound to maintain them forever if no specific provisions were made in the grant as to times and limitations.

The Supreme Court, however, has refused to extend the term contract to several forms of agreement between a state and its citizens. For example, appointment to a public office for a definite term at a fixed salary is not a contract, and a state impairs no obligation when it abolishes the office. A grant of power to a municipal corporation by a state legislature, a bounty law by which a state agrees to pay so much bounty on certain commodities produced within its borders, or a state license to sell liquor for a certain term of years is not a contract.

It should be noted also that the Court will declare a law invalid as impairing the obligation of contract *only* when it is retrospective, that is, when it applies to contracts made before its passage; and if a state provides in its constitution or laws for future revision of charters, franchises, and other forms of contract, it thereby places, in the body of the law, which, as we have seen, constitutes the obligation

[1] Burgess, *Political Science and Constitutional Law*, Vol. I, p. 235.

[2] In the famous case of Dartmouth *v.* Woodward, 4 Wheaton, 518, decided in 1819.

[3] 16 Howard, 369, decided in 1853.

[4] The Court has, however, somewhat limited this interpretation.

of contract, a provision securing henceforward the right to alter the terms of new franchises and privileges without violating this clause of the federal Constitution. All the states now safeguard, by this precautionary measure, their right to control privileges once granted, so that it is no longer possible for private corporations to secure either honestly or by corrupt means priceless franchises and then to defend them against withdrawal or modification by taking shelter under the contract clause of the federal Constitution. The general tenor of the provisions securing state legislatures from the strangling effect of this clause is illustrated by this extract from the constitution of Wisconsin: "All general laws or special acts, enacted under the provisions of this section [dealing with corporations], may be altered and repealed by the legislature at any time after their passage."

8. By far the most important guarantees for personal and property rights are to be found in the general clauses of the Fourteenth Amendment, which, for practical purposes, place in the hands of the federal judiciary the power of controlling state legislation on most important matters. According to section 1 of that Amendment, no state shall make or enforce any law which may abridge the privileges or immunities of citizens of the United States; no state may deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law. In order to understand the full import of the several terms employed in this brief but significant section, it is necessary to examine them in the light of judicial decisions, for in themselves they furnish slight clew to the real legal processes which they secure.

At the outset, what are the privileges and immunities of citizens of the United States which cannot be abridged by a state? The nationalist school of publicists, represented by Professor Burgess, contend, and advance sound historical arguments to show, that it was the purpose of the men who framed this clause to nationalize civil liberty, by setting up against the states those privileges and immunities which of right belong to the citizens of all free governments — that is, in particular, those privileges and immunities guaranteed to citizens against the federal government in the first ten amendments.[1]

[1] See *Readings*, p. 136.

The Supreme Court of the United States, however, has refused to accept this interpretation; and has held that there is a difference between the rights belonging to a citizen of the United States as such and those belonging to a citizen of a state as such, and that the latter must depend for their security and protection upon the state, as before the adoption of the Fourteenth Amendment. If it had been the intention of the Amendment, the Court held, to vest the protection of the whole domain of civil liberty in the hands of the federal government, the result would have been a revolution; Congress would have passed supplementary laws limiting and restricting the exercise of legislative power by the states in their most ordinary and usual functions; and finally the Court would thus be a perpetual censor upon all state legislation relative to the civil rights of the citizen.[1] The Court thereupon proceeded to enumerate some of the rights of "citizens of the United States" in contradistinction to the rights which they enjoy as citizens of states. A citizen of the United States has a right to approach the seat of government to assert any claim that he may have upon it, transact business with it, invite its protection, share its offices, and engage in its administration; he has access to its seaports, sub-treasuries, land offices, and courts of justice in the several states; he can claim the protection of the federal government in the defence of his life, liberty, and property on the high seas or when within the jurisdiction of a foreign government; he may join with other citizens in the peaceable assembling and petitioning for a redress of grievances; he has the privilege of the writ of habeas corpus, and the right to use the navigable waters of the United States. While these do not exhaust all of the possible privileges and immunities enjoyed by a citizen of the United States as such, they indicate the character of the narrow interpretation placed upon the clause by the Supreme Court.[2]

By far the most important part of the Fourteenth Amendment is a brief sentence which forbids a state to deprive any person[3] of life, liberty, or property, without due process of law. The term "life," as interpreted by the Supreme Court, means something more than mere animal existence; and the prohibition against its

[1] This is the language of the Court.
[2] Slaughter House Cases, 16 Wallace, 36.
[3] A corporation is a "person" in the eye of the law.

deprivation extends to all those limbs and faculties by which life is manifested. "The provision equally prohibits the mutilation of the body by the amputation of an arm or a leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world."[1] The term "liberty" used in this clause does not mean liberty in the abstract, but the freedom of the individual to do what he can within the limits of the law properly imposed and duly enforced, and freedom from interference by governmental authorities so long as he does not transgress the legal bounds to his sphere of individual action.[2] The term "property" is not limited to tangible goods having an exchange value, but it extends to every form of vested right which the possessor has legally acquired.[3]

Of none of these things may any person be deprived without due process of law; but what is due process of law? The Supreme Court has steadily refused to define "due process" in the abstract, and it is not possible to make any very satisfactory generalization. It may be said, however, that due process of law, as required by the Fourteenth Amendment, does not necessitate the use, by the state, of all those legal processes, such as indictment by grand jury and trial by petty jury with unanimous verdict, prescribed in the first ten amendments to the federal Constitution. Due process of law, said the Court in one case, is "due process according to the law of the land, and the law of the land is the law of the state."[4] In another case, due process of law was interpreted to mean "a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights."[5] And in still another case, the Court declared that there are certain immutable principles of free government which control the law of every state.[6] In other words, the Court seems inclined to hold that any law of a state is not invalid under this due process clause unless it transgresses certain theories of government existing nowhere in

[1] Munn *v.* Illinois, 94 U. S. R., 113.

[2] For Mr. Roosevelt's view of the social implications of the term, see *Readings*, p. 286.

[3] Campbell *v.* Holt, 115 U. S. R., 620.

[4] Walker *v.* Sauvinet, 92 U. S. R., 90.

[5] Pennoyer *v.* Neff, 95 U. S. R., 714.

[6] Holden *v.* Hardy, 169 U. S. R., 366.

the law, but only in the minds of the judges rendering the opinion.[1] The best way of ascertaining the full import of this phrase is to examine its application to certain classes of state laws.

(*a*) What is due process of law in criminal cases? A law of California provided that a person could be prosecuted for felony by information after examination and commitment *without* indictment by a grand jury. Under this law one Hurtado was charged with the crime of murder on information without preliminary grand jury hearing and indictment, and, after jury trial in the ordinary manner, was found guilty and condemned to death. Was Hurtado to be deprived of life and liberty without due process of law? The Court replied that due process of law under the Fourteenth Amendment was different from that of the Fifth Amendment; that it did not require indictment by grand jury; and that "any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the general public good, which regards and preserves these principles of liberty and justice [lying at the basis of all our civil and political institutions] must be held to be due process of law." [2]

(*b*) Due process of law in civil matters was defined in a general way in the case of Walker *v.* Sauvinet,[3] in which the court held that trial by jury in suits at common law in state courts was not a privilege which the states were forbidden to abridge by the Fourteenth Amendment, and that the requirement of the Constitution was met if a trial was had according to the set course of judicial proceedings. In other words, any process which establishes reasonable security, full notice, and satisfactory protection to persons involved in civil suits may be regarded as due process.

(*c*) In the imposition of taxes states must follow due process; and whenever a tax is imposed according to the valuation of property, due process merely requires general notice to the owner and a hearing of complaints so as to give him a chance to contest his liability; personal notice is not necessary. The right to be heard is not a necessary part of due process in the imposition of poll and license taxes, specific taxes on things, persons, or corporations, or many other kinds of taxes definitely fixed by legislative enactment.

[1] For a concrete illustration, see *Readings*, pp. 617 and 619.
[2] Hurtado *v.* California, 110 U. S. R., 516. [3] 92 U. S. R., 90.

(*d*) It is in legislation controlling corporations and protecting labor, that state legislatures most frequently come into conflict with due process of law as interpreted by the Supreme Court. For example, the legislature of Minnesota created a railway commission with the power to compel any common carrier to fix such rates as the commission should declare to be equal and reasonable, and made no provision for judicial review of the rates and charges so fixed. This law was held unconstitutional on the ground that it deprived a railway company of its right to judicial investigation by due process of law under the forms and with the machinery provided for the judicial investigation of the truth of any matter in controversy, and substituted for this, as an absolute finality, the action of a railway commission which could not be regarded as clothed with judicial functions or possessing the machinery of a court of justice.[1] To take another example: the legislature of New York passed a law providing that no employees should be required or permitted to work in bakeries more than sixty hours a week or ten hours a day, and the Supreme Court held this law invalid on the ground that it was an unreasonable, unnecessary, and arbitrary interference with the right and liberty to contract in relation to labor — the right and liberty to purchase and sell labor being within the protection of the Fourteenth Amendment.[2] Whenever a state regulates railway or other rates, its terms must be "reasonable," that is, allow proper returns on investments.[3]

A state, however, may do, under that vague authority known as the "police power," many things which interfere with life, liberty, and property; but the Court refuses to define the term police power, reserving to itself the right to determine at any time whether any particular act is warranted under that power or not. A broad interpretation of the term police power would give a state the right to do anything designed to promote general welfare as opposed to special privilege. Indeed, the Court once said that the police power is the power "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and its

[1] See *Readings*, p. 615.

[2] See *Readings*, p. 617; note also the dissenting opinion by Mr. Justice Holmes, *ibid.*, p. 619. [3] Reagan *v.* Loan and Trust Co., 154 U. S. R., 362.

prosperity."[1] It is evident, however, that such a generous interpretation of the powers of the state might very well nullify the provisions of the Fourteenth Amendment in the hands of any judiciary in sympathy with an increase in the control exercised by the state over private rights in the name of general welfare.

At all events a state, under its police power, may do many definite things. It may, for example, restrict dangerous and objectionable trades to certain localities; it may regulate, to a limited extent, railways and other common carriers; it may fix the hours of women and children in certain industries and determine minimum wages to be paid to them.[2] It is clear, nevertheless, that police power, like that other vague phrase "due process of law," is wholly within the keeping of the judicial conscience, and its interpretation depends upon the general social and political theories of the judiciary.[3]

The State and Nation

The position of the state in the federal system is not only fixed in law, as defined by the federal judiciary. The state forms a section of the great extra-legal party organization which dominates national politics and often subordinates state issues to the exigencies of federal issues. The state is, indeed, the fundamental unit in the national party system. Delegates to the national conventions are assigned to states mainly on the basis of their representation in Congress; federal patronage is distributed with a view to building up the general party organization within the limits of each commonwealth; United States Senators are generally party leaders within their commonwealths, and occupy positions of influence in the national party organization; and ambitious politicians in the state usually regard state offices as stepping-stones to higher things. Thus the great nation-wide party organization, founded on national as opposed to sectional interests, tends more and more to bring the state down from that proud position occupied in the beginning of our history.

The autonomy of the state is furthermore being reduced by the growth of national industries, interstate commerce, and national

[1] Barbier *v.* Connolly, 113 U. S. R., 27.

[2] See the important Oregon cases, *American Year Book* (1917), pp. 425, 426.

[3] This is based upon a statement by Mr. Justice Holmes; see *Readings*, p. 619. On the subject of the police power, see *Readings*, p. 394.

business organizations known as combinations and trusts. These new forces making for unity and centralization penetrate to the loneliest hamlets in the most thinly populated commonwealths.[1] The regulation of these great interstate interests is confided under the Constitution to the federal government, which is steadily multiplying in number and extent its supervisory activities. The conduct of commerce and industry by corporations increases the amount of legal business which is taken out of the hands of the state judiciary and vested in the federal courts under that clause of the Constitution which gives the latter authority and jurisdiction over suits between citizens of different states.[2]

While enumerating this multitude of restrictions upon the states, we must, at the same time, remember that an enormous and important domain of power is still reserved to them. Article 10 of the amendments provides that the powers not granted to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people. The regulation, therefore, of almost all the ordinary affairs of life is left to the states. As Mr. Bryce has put it, "An American may, through a long life, never be reminded of the federal government except when he votes at presidential and congressional elections, buys a package of tobacco bearing the government stamp, lodges a complaint against the post-office, and opens his trunks for a custom house officer on the pier at New York when he returns from a tour in Europe. His direct taxes are paid to officials acting under state laws. The state or local authority constituted by state statutes registers his birth, appoints his guardian, pays for his schooling, gives him a share in the estate of his father deceased, licenses him when he enters a trade (if it be one needing a license), marries him, divorces him, entertains civil actions against him, declares him a bankrupt, hangs him for murder; the police that guard his house, the local boards which look after the poor, control highways, impose water rates, manage schools — all these derive their legal powers from his state alone."

This, however, is too strong a statement of the case, for the

[1] See Moody, *The Truth about the Trusts.*

[2] For a protest of a state against this extension of power of the federal courts, see *Readings*, p. 233; see also the article by Professor Robert Bruce Scott in the American Political Science Review, for August, 1909: "The Increased Control of State Activities by Federal Courts."

individual does come into contact with the federal government far more often than it would lead us to believe — indeed, far more often than when Mr. Bryce wrote his epoch-making work. Although he may not be conscious of the fact, every time he purchases a commodity, smokes a cigar, or buys a postage stamp, the citizen pays tribute to the federal government; whenever he ships a commodity by freight to a point out of his state, he pays rates which are under the supervision of the Interstate Commerce Commission; the rural free mail delivery reaches him on his farm or in his summer camp in the mountains; if he journeys from one state to another, he pays a car fare which is under the regulation of the federal government. If he be a working man engaged in a strike against some large corporation, the chances are that the injunction against him will come from a federal court, and it will be on an order of that court that he is punished if he disobeys the injunction. If he attempts to send through the mails some publication which the post-office authorities may declare objectionable, he may find himself in the toils of the federal law. It is not necessary to continue the enumeration.[1] The federal government is not so far away from the life of the citizens as it once was, and as the economic organizations of labor and capital increase the extent and strength of their ramifications throughout the social body, the federal government will inevitably come nearer and nearer to the private citizen. Nevertheless, the functions of the state will also increase in importance, and the state as a guardian of fundamental public and private interests should grow in the esteem of the citizen.

The Admission of New States

The federal Constitution contains no details as to the way in which a new state may be admitted to the Union. It simply provides that new states may be admitted by Congress, and that no new state shall be formed out of another state or by the junction of two or more parts of different states without the consent of the legislatures concerned and Congress as well. A variety of methods have been employed in the admission of new states. Texas, for example, was admitted to the Union in 1845 as an indepen-

[1] Note also the operations of the pure food law, federal quarantine, forestry service, irrigation laws, the activities of the Department of Agriculture on behalf of the farmers, etc.

dent republic by resolution of Congress; and California never went through the territorial stage. The inhabitants of that region shortly after the cession from Mexico drew up a constitution, demanded admission to the Union, and Congress yielded.

The ordinary process of admitting a state is simple. The inhabitants of a territory present a petition to Congress praying for admission to the Union. If the petition is granted, Congress passes an "enabling act" authorizing the voters of that territory to call a convention to frame their constitution and thus prepare to take their position among the other commonwealths. If the people of the territory comply with the conditions, Congress then passes a resolution declaring the said territory to be a state and admitted to the Union; and the fact is generally announced to the world by a formal executive proclamation. In several instances, notably in the cases of Missouri, Kansas, Utah, and Oklahoma, Congress has entertained objections to the constitution drafted by the territory demanding statehood, and has delayed admission until certain suggested amendments were adopted.

The only constitutional question of any importance which has arisen in connection with the admission of new states is whether Congress has the power to impose on a commonwealth coming into the Union any limitations in addition to those laid down in the federal Constitution. It is the theory that all the states in the Union are equal in rights and privileges. The famous Northwest Ordinance of 1787, continued by Congress in 1789, declared that the new states created in that region should be admitted "on an equal footing with the original states in all respects whatever." On the admission of Ohio in 1802, however, Congress forced that state to agree not to tax for a period of five years any public lands sold within its borders by the United States. The enabling act for Nevada, passed in 1864, while declaring that the state should be admitted into the Union "upon an equal footing with the original states in all respects whatsoever," specifically required that its constitution should not be repugnant to the principles of the Declaration of Independence, that perfect religious toleration should be secured, and that the land belonging to non-resident citizens of the United States should not be taxed any higher than the lands of residents.[1]

[1] See *Readings*, p. 397; Dunning, *Essays on Civil War and Reconstruction*, pp. 305 ff.

The Supreme Court has declared, in a case involving limitations on Illinois that "whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787, or the legislation of Congress, it ceased to have any operative force except as voluntarily adopted by her after she became a state of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted and could be admitted only on the same footing with them."[1] Nevertheless, the Court has upheld a limitation on Minnesota by which that state, on its admission, was bound not to impose any tax on lands belonging to the United States, or any higher tax on non-resident proprietors than on residents. The Court said in this instance: "The case before us is one involving simply an agreement as to the property between a state and a nation. That a state and a nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions of this Court, and that they have been frequently made in the admission of new states, as well as subsequently thereto, is a matter of history."[2] Nevertheless, the Court seems inclined to distinguish between limitations with reference to political rights and obligations and those relating solely to property belonging either to the state or national government.[3]

State Constitutions

Subject to the limitations of the federal Constitution and to such limitations as may be imposed at the time of admission, the voters of each state may draft the constitution of their commonwealth as they please;[4] and one might naturally expect to discover the greatest divergences among the fundamental laws of the different states. On the contrary, however, we find striking similarities, especially among the constitutions of any particular decade.

Classifying the various state constitutions on the basis of their contrasts, we may put them in the following groups. There are,

[1] Escanaba *v.* Chicago, 107 U. S. R., 678.

[2] Stearns *v.* Minnesota, 179 U. S. R., 223.

[3] Bolln *v.* Nebraska, 176 U. S. R., 83.

[4] It must be noted that the Constitution requires every state government to be "republican" in form.

in the first place, the older states whose constitutions bear the impress of colonial times. In this group we may place Massachusetts, whose fundamental law of 1780 has not been reorganized; Connecticut, with a constitution that has not been subjected to a general revision since its establishment in 1818; Rhode Island, with the slightly amended constitution of 1842; New Hampshire, with the old fundamental law of 1792, slightly reconstructed in 1903.

In the second group may be placed the constitutions which may be said to belong to the generation just past, and in size, form, and general content stand midway between the New England constitutions and those of the most recent years: New York (1894), Pennsylvania (1873), Indiana (1851), Illinois (1870), Wisconsin (1848), Kentucky (1891), Minnesota (1857), Nebraska (1875), Missouri (1875), Iowa (1857), and Tennessee (1870).

In the third group may be placed the southern states, many of which — Virginia (1902), South Carolina (1895), Alabama (1901), Mississippi (1890), and Louisiana (1898) — have revised their constitutions within the last fifteen or twenty years.

In the fourth group may be placed the newest western constitutions, noted for their more or less radical departures from the precedents set by the older commonwealths: California (1879), with frequent alterations; Oregon (1857), embracing the important amendments of 1902, 1906, and 1908; Oklahoma (1907); and Michigan (1908).

The differences in the constitutions, however, are no index to the real differences in form of government, for nearly all of the newer and more bulky fundamental laws provide for institutions which have been set up in older states by legislative enactment. For example, there is no clause in the constitution of New York creating a public service commission, and yet New York has a commission with large powers over common carriers within each of the two districts into which the state is divided. On the other hand, the constitution of Oklahoma contains several pages of law creating the public service commission and defining its powers and activities. Moreover, in drafting new constitutions, the state conventions are quick to take advantage of a comparative study of the laws of other states. The members of the New York constitutional convention, for instance, had before them in tabu-

lated form the provisions of the constitutions of every state in the Union, grouped according to subject-matter;[1] and this handy compendium of comparative constitutional law was evidently examined with considerable care, as the debates from day to day revealed.[2] A study of the constitution of Oklahoma shows many clauses which have been taken almost word for word from the constitutions of other states.

A state constitution usually falls into six parts: (1) a bill of rights; (2) the sections providing the framework of government, central and local, and the fundamental limitations of each branch; (3) the sections dealing with state finances; (4) the clauses providing for the control of economic interests, such as railways, insurance, banking, and labor; (5) the clauses providing for education and social welfare generally; and lastly (6) the amendment clause.

I. Taking several of the state constitutions together, we find that a composite view of the bill of rights reveals two somewhat sharply defined parts.[3] The older part contains those ancient and honorable limitations on behalf of private rights so famous in the constitutional history of England and the United States —indictment by grand jury; trial by jury; the free exercise of religious worship without discrimination or preference; the privilege of the writ of habeas corpus save in case of rebellion, invasion, or public danger; prohibition of excessive bail and fines and cruel and unusual punishments; compensation for private property when taken for public use; the right of every citizen to speak freely, write and publish his sentiments on all matters subject to responsibility for libellous publications; and the right peaceably to assemble and petition the government or any department thereof.[4]

By the side of these rights of ancient English origin, we find, in many of the recent state constitutions, a number of newer principles; such, for example, as are laid down in the constitution of Oklahoma. In that document, prosecution for felony and misdemeanor by information as well as by indictment is expressly sanctioned, but no one may be prosecuted by information for

[1] So also in Michigan in 1907.

[2] See *Readings*, p. 144.

[3] Compare, for example, the bill of rights of the Oklahoma constitution with that of the New York constitution.

[4] Drawn from Article I of the constitution of New York.

felony without having had a preliminary hearing before an examining magistrate or having waived such hearing. In county courts and courts not of record the petty jury consists of only six men; and in civil cases and in criminal cases involving crimes less than felony, three-quarters of the whole number of jurors may render a verdict. In other cases unanimity is required. In all criminal prosecutions for libel the truth of the matter alleged to be libellous may be given in evidence to the jury, and if it appears to the jury that the matter charged as libellous is true, or was written with a good motive or for justifiable ends, the party shall be aquitted — a provision in behalf of liberty of speech and press which is to be found in the constitutions of more conservative states like New York.

While safeguarding private property by providing that it shall be taken for private use only under very strict limitations and for public use only when just compensation is given, the Oklahoma constitution declares that "the right of the state to engage in any occupation or business for public purposes shall not be denied nor prohibited, except that the state shall not engage in agriculture for other than educational and scientific purposes and for the support of its penal, charitable, and educational institutions." It furthermore provides that municipal corporations may engage in any business or enterprise which may be carried on privately under a franchise from the municipality.[1] Perpetuities and monopolies are declared to be contrary to the genius of free government and forever prohibited.

Corporations are excluded from several privileges and immunities secured to natural persons, for the framers of Oklahoma's fundamental law have provided for unrestricted searches into the actual operations of corporations, by explicitly stating that their records, books, and files shall be at all times subject to the full visitorial and inquisitorial powers of the state, notwithstanding the rights secured to persons and to citizens. The ancient rule of law that a person is not required to give evidence tending

[1] In case a state should engage in business on such a large scale as to destroy the enterprises of private persons, would claims for compensation lie against it, or would the Oklahoma courts extend to the body politic that principle laid down by the English courts with reference to private corporations, namely, that damages are not recoverable for injury done in the ordinary course of competition? See Webb, *Industrial Democracy* (1902), p. xxix.

to incriminate himself when testifying against any other person or corporation is abrogated, but his substantial right is secured by the provision that he shall not be prosecuted or subjected to any penalty or forfeiture for or on account of anything concerning which he may testify or produce evidence.

The constitution of Oklahoma furthermore guarantees to its citizens complete immunity from martial law by declaring, "The privilege of the writ of habeas corpus shall never be suspended by the authorities of this state." This subordination of military to civil authority is accompanied by a positive limitation on the power of the judiciary in the granting of injunctions. The legislature, it is declared, shall pass laws defining contempts and regulating proceedings and punishments in case of contempt; but every person accused of violating or disobeying an injunction out of the presence and hearing of the court is to be entitled to trial by jury to determine his guilt or innocence, and in no case shall penalty or punishment be imposed for contempt until the accused has had an opportunity to be heard.

In addition to these ancient and newer principles of civil liberty, there are to be found in several bills of rights curious provisions which belong rather to the sphere of political theory than to constitutional law, but are interesting nevertheless. The constitution of Lousiana, drafted in 1898, declares that "all government of right originates with the people, is founded on their will alone and is instituted solely for the good of the whole; its only legitimate end is to secure justice to all, preserve peace and promote the interest and happiness of the people." According to the constitution of Kentucky (1891), "absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority. All men when they form a social compact are equal; . . . all power is inherent in the people and all free governments are founded on their authority and instituted for their peace, safety, happiness, and the protection of property. For the advancement of these ends, they have at all times an inalienable and indefeasible right to alter, reform, or abolish their government in such manner as they may deem proper." The Massachusetts constitution solemnly announces: "It is the right as well as the duty of all men in society, publicly and at stated seasons to worship the Supreme Being, the great creator and the preserver of the universe." The inhab-

itants of Vermont are warned by the eighteenth article of the declaration of rights "that frequent recurrence to fundamental principles and a firm adherence to justice, moderation, temperance, industry, and frugality are absolutely necessary to preserve the blessings of liberty and keep government free; the people ought, therefore, to pay particular attention to these points, in the choice of officers and representatives, and have a right in a legal way to exact a due and constant regard to them, from their legislators and magistrates, in making and executing such laws as are necessary for the good government of the state." While guaranteeing freedom of religious worship, the constitution of Pennsylvania declares, "that no person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth."

II. The second part of a state constitution embraces those sections dealing with the distribution of powers, the frame of government, and the limitations on the authorities of the state. This part usually outlines the form of the central government in considerable detail, and contains more or less explicit provisions in relation to rural and municipal government. It defines the suffrage, provides for the organization of the legislature, and prescribes the limitations under which it must operate. It provides for the election of the governor and the great officers of state, leaving the construction of the minor administrative offices and boards to the legislature; it creates the judicial system, state and local; but generally intrusts the regulation of minor details with regard to jurisdiction, procedure, and appeals to the legislature.

III. The third division of our composite state constitution places fundamental limitations upon the financial power of the state legislature.[1] The provisions are often detailed and complicated, but their general purpose is to fix a debt limit beyond which the legislature cannot go, and to compel that body to make adequate provision for the payment of interest and principal on debts created.[2]

IV. The fourth part of our composite state constitution lays down, with considerable minuteness, the general principles which

[1] See below, chap. xxxi.

[2] *Readings*, p. 460.

shall be applied in the regulation of corporations and conditions of labor.[1] The newer constitutions are especially full and explicit in these points; they not only provide that corporations shall be chartered under general rather than special laws, but they go into great detail with regard to public service corporations. Northern constitutions — for example, those of New York, Pennsylvania, Ohio, and Indiana — dispose of the matter in relatively few words; but the constitution of Virginia, drafted in 1902, contains twelve large and closely printed pages on the subject of corporations alone; while Oklahoma gives fourteen pages of the same size to that branch of law.[2] These newer constitutions limit very narrowly the activities of corporations. They provide for a corporation commission with large powers in the regulation of rates, charges, and general conduct of corporate business. Oklahoma provides for physical valuation of railways; endeavors to prevent stock watering; fixes a rate of two cents a mile for carrying passengers, subject to change by the legislature and corporation commission; and prohibits the consolidation of competing companies and the establishment of monopolies. On behalf of labor, the Oklahoma constitution provides for a separate state department, prohibits the contracting of convict labor, stipulates an eight-hour day in all public employments, orders the legislature to pass laws protecting the health and safety of employees in factories, mines, and on railroads.[3]

V. The fifth part of our composite constitution contains a large variety of miscellaneous provisions designed to promote general welfare. It usually includes sections relative to the public schools and the state educational system; the Nebraska constitution, for example, requires the legislature to provide free instruction in the common schools of the state for all persons between the ages of five and twenty-five; it sets aside certain revenues for educational purposes; and creates a board of regents for the state university and prescribes their duties. Under these general provisions we also find clauses authorizing legislation creating workmen's compensation systems, providing for the care and maintenance of the poor, exempting homesteads from forced sales for debt except under prescribed conditions,

[1] *Readings*, pp. 91 and 610.

[2] See Thorpe, *American Charters, Constitutions and Organic Laws*, Vol. VII, pp. 3936, 4300.

[3] See below, chap. xxxii.

fixing the maximum rates of interest, safeguarding public health, creating charitable and eleemosynary institutions, and controlling the care and management of public property.[1]

VI. The last part of our composite constitution makes provision for future alterations by prescribing the way in which amendments may be proposed and adopted.[2]

The State Courts and the Constitution

The constitution of a state is its fundamental law, and stands very nearly in the same relation to the authorities of the state in which the federal Constitution stands to federal authorities.[3] In other words, it is the supreme law of the commonwealth, and the state courts are bound to hold unconstitutional the act of any state authority, legislative or executive, which violates that supreme law.[4] This principle, which met with some resistance in the beginning of our history, has now been universally accepted. "In exercising this high authority," it has been said, "the judges claim no judicial supremacy; they are only the administrators of public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the constitution and because the will of the people which is therein declared is paramount to that of their representatives expressed in any law."

In passing upon the constitutionality of acts of the legislature, the courts of New York have laid down certain principles which are quite commonly accepted throughout the United States.[5] The constitution should be so construed as best to promote the objects for which it was made, avoiding the two extremes of a wide and a strict construction; statutes are presumed to be constitutional; an act must be constitutional in substance as well as in form; the constitutionality of statutes is not to be passed upon unless necessary to the decision of the case in ques-

[1] Below, chap. xxxii.

[2] Below, chap. xxiii, and *Readings*, p. 411.

[3] In Florida, Maine, Massachusetts, New Hampshire, Colorado, and South Dakota, the judges of the high court are required to give opinions when requested by the governor or legislature, or both.

[4] The state judges are also bound to declare void a state act violating the federal Constitution.

[5] From the *Legislative Manual of New York* (1908), pp. 83 ff.

tion; no statute should be declared unconstitutional unless it is in direct, clear, and necessary conflict with the constitution; a law, unconstitutional in part, may be enforced as to its constitutional provisions. A statute evading the terms and frustrating the general and clearly expressed or necessarily implied purposes of the constitution is as certainly void as if expressly forbidden; in the case of an act susceptible of valid or invalid construction courts should lean to construction of validity; if an act is corruptly administered, this is no reason for holding it unconstitutional; the long and undisputed practice in the construction of a constitutional provision by the legislature has almost the force of judicial exposition in its interpretation.

Experience has shown that the state courts have been on the whole more conservative than the Supreme Court of the United States in passing upon the constitutionality of legislation, particularly of a social character. For example, the highest court of New York, in 1911, declared the workmen's compensation act of the previous year unconstitutional on the ground that it "authorized the taking of the employer's property without his consent and without his fault and giving it to the employee, without a hearing in any judicial proceeding." That this interpretation did not represent the popular opinion of the matter was evidenced by the immediate adoption of an amendment to the constitution of the state empowering the legislature to enact laws to protect the lives, safety, or health of employees, including workmen's compensation measures. It was in reference to such cases that Mr. Roosevelt proposed in 1912 that: "Whenever in our constitutional system of government there exist general prohibitions that, as interpreted by the courts, nullify, or may be used to nullify, specific laws passed, and admittedly passed, in the interest of social justice, we are for such an immediate law or amendment to the constitution, if that be necessary, as will thereafter permit a reference to the people of the public effect of such decision under forms securing full deliberation, to the end that the specific act of the legislative branch of the government thus judicially nullified . . . may be constitutionally excepted by vote of the people from the general prohibitions."[1] With a view to limiting the exercise of the power of passing upon legislation, it has been more than

[1] For the recall of judges, see below chap. xxvi.

once proposed that the decision of the courts in such cases should be unanimous on the theory that when unanimity exists there can be no reasonable doubt as to the correctness of the judicial interpretation. Notwithstanding many proposals and much agitation on the subject the power of the state courts remains substantially unimpaired.

The Suffrage

The ultimate political power in every state, subject to the limitations of the federal Constitution, is vested in those persons who possess the qualifications required for exercise of the suffrage under the fundamental law of the state. These qualifications may be classified into five groups: age, sex, residence, citizenship, and miscellaneous.

All of the states have adopted the ancient English rule of fixing the age limit at twenty-one years.

Fifteen states, Colorado, Idaho, Utah, Wyoming, Washington, California, Oregon, Kansas, Arizona, Montana, Nevada, New York, Michigan, Oklahoma, and South Dakota, had conferred equal suffrage upon women when Congress, in 1919, submitted the federal woman suffrage amendment to the states for ratification. Several states, Connecticut, Delaware, Kentucky, Massachusetts, Mississippi, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, Ohio, North Dakota, Vermont, and Wisconsin, had given women the right to vote in school elections. Illinois and Rhode Island, acting under Article II, sec. 1, par. 2, of the federal Constitution, had granted to women the right to vote for presidential electors.[1]

The length of residence required in a state before any person is allowed to vote varies from three months in Maine to two years in Alabama, Louisiana, Mississippi, North Carolina, Rhode Island, South Carolina, and Virginia. Several of the states — Idaho, Indiana, Iowa, Michigan, Nebraska, and Oregon, for example — fix the term at six months. The most common rule, however, is one year — the rule in force, for instance, in Arkansas, California, Colorado, Missouri, Ohio, Pennsylvania, and New York.

Nearly all of the states require voters to be bona-fide citizens

[1] For arguments on both sides, see *Readings*, p. 405.

of the United States; but Indiana, Nebraska, North Dakota, Texas, and Kansas admit to the suffrage aliens who have declared their intention of becoming citizens. This practice of conferring political rights upon foreigners was early adopted to encourage immigration, but within recent years it has met with serious protests,[1] and no doubt it will be abandoned in due time.

Among the special limitations imposed by the states on suffrage are tax and educational tests, and the peculiar tests applied in the South to exclude the negroes.[2] Tax qualifications are imposed by only a few states. The constitution of Arkansas requires the voter to exhibit a poll tax receipt or other evidence that he has paid his poll tax; Tennessee likewise requires the payment of a poll tax; and the constitution of Pennsylvania provides that voters of twenty-two years of age or upwards must have paid within two years a state or county tax, assessed at least two months, and paid at least one month, before election. In some of the southern states the tax-paying qualification forms one of the alternative qualifications laid on voters.

Almost one-third of the states impose some kind of an educational test, either as an absolute or alternative qualification.[3] Massachusetts, for example, requires the voter to be able to read the constitution of the state in the English language and write his own name, if he is not prevented by physical disability or was not over sixty years of age at the time the amendment went into effect. Connecticut likewise prescribes that the citizen must be prepared to read, in the English language, any article

[1] *Readings*, p. 143.

[2] Idiots, insane persons, and criminals are excluded from the right to vote.

[3] In 1919, fourteen states — Alabama, California, Connecticut, Florida, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, North Carolina, South Carolina, Washington, and Wyoming — had a reading qualification. Eight of these states added some sort of a writing qualification, some requiring the voter to write his name, while in others the voter had to write a portion of the constitution; one state required the voter to write out the application for registration. In the southern states, however, the force of the educational qualifications is generally greatly diminished by exempting from them large classes of persons who possess other qualifications prescribed by law as alternatives. Some of the other states exempted persons who were voters at the time of the adoption of the requirement. Most of the fourteen states also exempted persons who were physically unable to read or write. John B. Phillips, *Educational Qualifications of Voters*, University of Colorado Studies, Vol. III, pp. 55 ff.

of the constitution or any section of the statutes of the state before being admitted to the privileges of an elector.

In order to exclude negroes from the vote without violating the letter of the federal Constitution, several of the southern states have devised special qualifications for voters. The constitution of Mississippi, for example, provides that the voter must never have been convicted of bribery, burglary, perjury, or any one of several enumerated offences; and must have paid all the taxes which may have been legally required of him, including the poll tax; and must be able to read any section of the constitution of the state or be able to understand it when read to him, and give a reasonable interpretation thereof. Negroes often have great difficulty in giving a "reasonable" interpretation to the satisfaction of the registration officers.

In Louisiana the voter must demonstrate his ability to read and write, on his application for registration; or if unable to read and write he must be the bona-fide owner of property valued at not less than $300; provided, however, "that no male person who was on January 1, 1867, or on any date prior thereto entitled to vote under the constitution or statutes of any state of the United States wherein he then resided and no son or grandson of any such person not less than twenty-one years of age at the date of the adoption of this constitution and no male person of foreign birth who was naturalized prior to the first day of January, 1898, shall be denied the right to register and vote in this state by reason of his failure to possess the educational or property qualifications prescribed by this constitution."[1] It will be noted that none of these provisions requiring an educational, property, or family qualification is in contravention of the Fifteenth Amendment, which merely provides that no person shall be disfranchised on account of race, color, or previous condition of servitude. However, they make the state which imposes them liable to a reduction in representation in Congress under the Fourteenth Amendment.[2]

The effect of these southern limitations on the negro vote can

[1] Resident and similar qualifications are, of course, required. For the suffrage provisions of the Virginia constitution of 1902 excluding negroes, see *Readings*, p. 402.

[2] The "Grandfather" clause of Oklahoma was declared void by the Supreme Court of the United States in 1916, *American Year Book* (1916), p. 248.

be gathered from the published statistics for South Carolina and Mississippi.[1] It appears that in those states there were 350,796 adult male negroes in 1900 and that the total Republican vote (in both states) in the national election of that year was only 5443. At a rough guess, perhaps 2000 of this number were cast by white men, and the conclusion must be that about ninety-nine negroes out of every hundred failed to vote for President in those states.

Several attempts have been made to test the constitutionality of these suffrage laws, but the Supreme Court of the United States, principally on technical grounds, has been able to avoid coming to a direct decision on the merits of the particular measures. In one of these cases,[2] the plaintiff alleged that the Alabama constitutional restrictions on the suffrage were designed to deprive the negroes of the vote, but the Court answered that a court of equity could not remedy such a wrong; that the court could not, through its officers, take charge of and operate the election machinery of Alabama; and finally concluded "that relief from a great political wrong, if done as alleged, by the people of a state and by the state itself, must be given by them or by the legislative and political departments of the Government of the United States."[3]

[1] Mr. J. C. Rose, in the Political Science Review, for November, 1906, p. 20.
[2] Giles *v.* Harris, 189 U. S. R., 474.
[3] On this question, see E. G. Murphy, *Problems of the Present South.*

CHAPTER XXIII

POPULAR CONTROL IN STATE GOVERNMENTS

More than half a century ago Carlyle said that whoever had occasion to write or speak in that day must take account of the fact that democracy had arrived; and an eminent English publicist of our time, Mr. G. Lowes Dickinson, has restated the doctrine in a little more concrete form when he says, "Governments in every civilized country are now moving towards the ideal of an expert administration controlled by an alert and intelligent public opinion." The awakening of this alert and intelligent public opinion is the problem of education in its broadest sense; but in order to make this opinion effective in controlling legislatures and executives it is necessary to devise electoral machinery which will work with as little friction and waste of public spirit as possible.

The Amending System

As we have seen, the metes and bounds of state government are set in the constitution, and to enable popular will to alter this fundamental law from time to time, as new conditions arise, some regular legal process of amendment is indispensable. The exact method varies in character and operation from state to state, but there are certain general principles and tendencies which are now well established.

I. In the first place, about two-thirds of the states[1] provide for amendment by a convention composed of delegates chosen by the voters, and many constitutional lawyers hold that the legislatures of the remaining states can call conventions under their general legislative powers. A few states, including New York, provide that the question whether a constitutional con-

[1] See Professor J. W. Garner's article in the American Political Science Review for February, 1907. For current state constitutional amendments consult the section on "State and County Government" in the *American Year Book* for each year.

vention shall be held must be referred to popular vote at stated intervals; and New York also gives the legislature the power to submit the proposition to call a convention at any time it may see fit. More than one-half of the states, however, merely authorize the legislature to determine, at its discretion, when a constitutional revision is advisable, submit the question to popular vote, and on approval make provision for the election of delegates. Most of these constitutions require an extraordinary majority in the legislature before the proposition of calling a convention can be submitted to the electorate; and some of them, in addition, require the approval of a majority of *all* those voting at some election.[1] Wherever these two provisions are found in conjunction, it is well-nigh impossible to amend the constitution.

Very few of the state constitutions that provide for amendment through the convention system are explicit as to the methods by which the delegates shall be apportioned and elected. In this regard the constitution of New York is more satisfactory than that of most other states because it goes into greater detail. It provides that three delegates for each senatorial district and fifteen delegates-at-large shall be chosen by the voters; it prescribes the time at which the delegates shall convene; fixes the quorum at a majority; makes some provisions as to procedure; and concludes with the requirement that the constitution or amendments adopted by such convention must be submitted to popular ratification.

II. The second general method of amendment, to be found in all states except New Hampshire, including those which have the convention system as well, is through legislative action ratified by popular vote. In several of the states, as widely separated as Illinois, Kansas, Washington, California, and Mississippi, two-thirds of all the members elected to both houses of the legislature are required to initiate an amendment. A few states, among which are Florida and Ohio, fix the majority at three-fifths; while New York,[2] Indiana, Minnesota, Wisconsin,

[1] Only two commonwealths, Georgia and Maine, authorize the legislature by concurrence of two-thirds of both houses to call a convention without referring the question to popular vote.

[2] *Readings*, p. 411. In 1910 a proposition was introduced into the New York legislature providing that a *two-thirds* vote of both houses (and a repeti-

Tennessee, and some other commonwealths require only a simple majority. In about one-third of the states, including Massachusetts, New York, South Carolina, Vermont, Indiana, and Oregon, the constitution provides, in addition, that an amendment proposed by one legislature must be approved by the succeeding legislature before being submitted to the people. It is the common practice now to require an approval of only a majority of the popular vote cast on the proposition; but a few commonwealths stipulate that an amendment must receive a majority of all the votes cast at some state election in order to become a law.

III. The third mode of amendment, that of the initiative and referendum, is to be found in several states.[1] For example, an amendment to the constitution of Oregon, ratified in June, 1902, expressly reserves to the people the power to propose amendments to the constitution and to approve or reject the same at the polls independent of the legislative assembly. It provides that eight per cent of the legal voters may propose an amendment by petition, and if the proposal, on its submission to popular ratification, receives a majority of all the votes cast thereon, it becomes a part of the fundamental law of the state. A somewhat similar method is in force in Oklahoma, but fifteen per cent of the voters must sign the petition to initiate a constitutional amendment, whereas only eight per cent are required to propose any ordinary legislative measure.

tion of the process) should be required to submit a constitutional amendment to the voters, and that for ratification an amendment must receive a majority vote of the electors voting for members of the legislature. In support of the measure, Mr. Dana, who introduced it, said: "For some time past, amendments to the Constitution have been passed by a very small vote in proportion to the total vote cast. At the last election only 81,517 votes out of a total vote of 318,035 in the City of New York, were cast for the constitutional amendment receiving the greatest number of votes, while in the rest of the state, out of a total of 702,965 votes, only 290,795 were cast for the amendment. This does not by any means express the will and desire of the people." The proposal was later modified to the effect that any amendment must be approved by at least 30 per cent of the vote for assemblymen. It was not adopted in any form, however.

[1] For the Oklahoma system, see *Readings*, p. 413.

The Initiative and Referendum

The participation of the people in the making of constitutional law is not only on the increase,[1] but there is also a decided tendency to extend the power of the voters to ordinary legislation as well. Indeed, the constitution of Oklahoma provides that the style of all bills shall run "Be it enacted by the people of the state of Oklahoma."

As we have seen, the practice of even submitting constitutions to popular ratification was not one of the original devices of our constitutional system, only three of the eighteenth-century constitutions being submitted to the electorate for approval or rejection. Slowly, however, the idea came to be accepted that voters, in a final analysis, had the right to pass upon their own fundamental laws. The New York constitution of 1821 was referred to the electorate, and it further provided that amendments should likewise be submitted to the voters after having received legislative approval. By the middle of the nineteenth century the doctrine of the constitutional referendum was fairly fixed, and most of the constitutions since 1850, excepting those of Delaware (1897), Mississippi (1890), South Carolina (1895), and Virginia (1902), have been approved by popular vote.

The idea of referring such matters to the people was, however, not adopted without a strong opposition, which was based on the ground that a convention, duly chosen and solemnly deliberating, was the best institution for making fundamental laws, and that no further action was required. Even as late as 1894, Mr. Dean, speaking in the New York constitutional convention, declared that the practice of referring constitutions to the people merely encouraged cowardice on the part of the representatives and enabled them to shirk their own responsibilities by leaving the power of making the final decision to the electorate.[2] But Mr. Dean's protest was in vain, for the constitution drafted by that body provided that all future amendments, whether by way of conventions or legislative enactment, should be submitted to popular approval.

The doctrine of popular referendum was also early extended

[1] See above, p. 96.

[2] *Record of the Constitutional Convention* (1894), Vol. II, p. 801.

to several important matters besides constitutions and amendments. The courts have usually held that, in the absence of express constitutional warrant, the legislature has no power to refer general laws to the electorate; but some of them have maintained that it is proper to refer to the people the question of the time when a certain law shall go into effect. Under the cover of this legal theory several state prohibition laws were referred to popular approval. The legislature of New York, in 1849, submitted the proposition of establishing free schools to the decision of the electors; and the question of woman suffrage was laid before the voters of Massachusetts in 1895. It is likewise common to require the reference of special financial measures to popular approval; for example, the constitution of New York fixes a certain debt limit, beyond which the legislature cannot go without receiving the approval of a majority of the electors voting on the proposition. The practice of referring local laws of a special character, such as those selecting county seats and changing county or city boundaries, was also adopted early in our history.

It was not such a long step, therefore, from these and similar practices, to the adoption of a complete system of initiative and referendum, whereby the voters may initiate any measure or require the referendum on any legislative act. Many causes are responsible for this extension of older practices. In some instances, legislators were only too glad to shirk their responsibilities by leaving certain questions to the decision of popular vote. The practice of enlarging the state constitutions so as to include provisions of a temporary and statutory, rather than a fundamental, character led to the breaking down of the old distinction between the solemn formulation of constitutional law and the enactment of mere statutes. Perhaps the most important reason, however, was a distrust in the legislature[1]—a distrust that filled our state constitutions with long and detailed limitations on the powers of legislatures and finally ended, in several states, in the assumption of ultimate legislative authority by the voters.

It was under these circumstances that the initiative and referendum were adopted as remedies for our legislative evils. The system is a simple one.[2] The initiative is a device whereby

[1] *Readings*, pp. 478, 483.

[2] *Readings*, p. 413.

any person or group of persons may draft a statute, and on securing the signatures of a small percentage of the voters may compel the state officials, with or without the intervention of the legislature, to submit the same to popular vote; and if the required popular approval is secured, the proposal becomes a law. The referendum is a plan whereby a small percentage of the voters may demand that any statute passed by the legislature (with the exception of certain laws) must be submitted to the electorate and approved by a stipulated majority before going into effect. But as is pointed out below, p. 469, so many variations in the system are possible that each of the several plans must be studied in detail in order to understand all of its possibilities.

Not less than nineteen states, including South Dakota, Oregon, Idaho, Massachusetts, Michigan, Missouri, Montana, Utah, Maine, Oklahoma, Nevada, Arkansas, Colorado, California, Washington, Nebraska, North Dakota, Ohio, and Arizona, have established the initiative and referendum in one form or another.[1]

The scheme has been put into operation a number of times; Oregon has given it extensive trial under fair circumstances; and that state has also worked out a complete scheme for educating the voters on measures referred to them. The system was established in Oregon by a constitutional amendment approved in June, 1902. This amendment provided that any legislative[2] measure might be initiated by a petition bearing the signatures of eight per cent of the voters and containing the proposed measure in full. The petition must be filed with the secretary of state not less than four months before election day; it is mandatory upon him to submit it to popular vote, and if the proposal is approved by a majority of all the electors voting on it, it becomes a part of the statutory law of Oregon. Any act[3] passed by the legislature must likewise be referred to the electorate if five per cent of the voters file a duly executed petition within ninety days after the adjournment of the legislature, demanding such a referendum.

[1] See Beard and Shultz, *Documents on the Initiative, Referendum and Recall*, p. 1, and the annual editions of *The American Year Book*.

[2] See above, p. 460, as to constitutional measures.

[3] Except emergency laws relative to public peace, health, or safety.

The most noteworthy feature of the Oregon system is, however, the statute providing for the publication and distribution of arguments for and against the propositions submitted to the decision of the voters. Under this law the supporters and opponents of any particular measure may prepare their arguments at length; these arguments are printed by the state (at the expense of the private parties concerned), together with the measures to be referred to the voters; and a copy is sent to every voter in the commonwealth.[1] It is contended by the friends of this system that it has an immense educational value in arousing the interest of the people; in securing the consideration of each measure on its merits; and in turning the searchlight of publicity and discussion upon all the important political issues in the state. In 1908, the measures referred to the voters and the arguments favoring and opposing certain of them constituted a booklet of 124 pages, a copy of which was sent by the secretary of state to every voter. The arguments are kept within a reasonable compass by the provision that whoever prepares them must pay for their publication at a regular rate. On the question of women's suffrage, which was submitted to popular vote and defeated, there were four pages of favorable argument signed by twelve women representing the Oregon Equal Suffrage Association, while the negative side of the case was presented in two pages prepared by the Oregon Society Opposed to the Extension of the Suffrage to Women.[2]

A modified form of the initiative was established in Illinois, in 1901, by a law creating what is known as the "Public Opinion System."[3] Under this law twenty-five per cent of the registered voters of any incorporated town, village, city, township, county or school district may compel the submission of any local question to popular vote; and ten per cent of the registered voters of the state may secure the submission of a proposition to the electorate of the entire commonwealth. The petition for taking public opinion on a question must be filed not less than sixty days before the day of the election at which it is to be submitted. If the voters approve a proposition referred to them, it is

[1] See *Readings*, p. 415, for an extract from this remarkable statute.

[2] See interesting article on this system by Professor George H. Haynes in the Political Science Quarterly, Vol. XXII, p. 484.

[3] For the proposed Massachusetts law, *Readings*, p. 418.

understood that public opinion demands its enactment into law; but as the members of the legislature are not pledged to obey the wishes of their constituents, this expression of public opinion is regarded as merely advisory and, therefore, of slight importance.

The system of initiative and referendum is being extended to local as well as to state-wide matters.[1] The constitution of Oklahoma provides that the powers of the initiative and referendum, reserved to the people for the state at large, are also reserved to the voters of every county and district therein as to all local legislative or administrative actions in their respective counties and districts. A Nebraska law of 1897 provides that an ordinance or any other measure may be proposed in counties, cities, and other local divisions by a petition signed by fifteen per cent of the voters and given the effect of law by the approval of a majority. The same statute authorizes local government bodies voluntarily to submit propositions to popular ratification, and requires them to refer any measure to popular vote if it is demanded by a petition bearing the signatures of fifteen per cent of the electors. According to an Indiana statute of 1899, the referendum may be demanded by forty per cent of the voters in an incorporated town within thirty days after the passage of any ordinance to purchase water or light plants or grant franchises; and if any such proposition is rejected on the referendum, no similar ordinance can be enacted within three years. The various local option laws permitting the voters of counties and other units of local government to pass upon the question of licensing saloons may likewise be regarded as a part of the general scheme of initiative and referendum.

A unique plan was adopted in Ohio in 1912. It does not provide for the direct initiation of statutes by the voters, but permits them to introduce a measure into the legislature on a three per cent petition. If the bill in question is rejected by the legislature, then an additional three per cent is necessary to procure the reference of the proposition to the voters at the polls. The idea back of this plan is that any measure referred to the voters should be first discussed in the legislature. If upon such debate the legislature accepts the bill, the purpose of the initiators is realized. If the legislature rejects it and a referen-

[1] For cities, see below, p. 597.

dum is taken, the public has enjoyed the benefit of a public discussion by the law-makers. Thus an attempt is made to meet the common objection that the referendum does not obtain the scrutiny to which every measure of law should be subjected.[1]

It is not at all surprising that a system which proposes to vest the legislative power in the mass of voters, rather than in the representative branch of the state government, and which has already been adopted in so many states, should awaken considerable opposition and criticism. It is contended by the opponents of the initiative and referendum that legislation, being a difficult and technical matter demanding the attention of experts and careful deliberation, cannot be done effectively by the mere counting of heads. Long ago Austin said that "what is commonly called the *technical* part of legislation is incomparably more difficult than what may be called the *ethical*. In other words, it is far easier to conceive justly what would be useful law than so to construct that same law that it may accomplish the design of the lawgiver." This technical difficulty is illustrated by the anecdote, related by Mr. J. B. Sanborn, of a member of a legislature who once said to him, "When I came to the legislature I introduced a bill to prohibit the manufacture of filled cheese. It would have done it all right, but it would have prevented the manufacture of all other kinds of cheese, too." A practical example of the failure of the initiative and referendum to secure due consideration of the technical difficulties in law-making is afforded by the anti-pass law, submitted in Oregon on an initiative petition in 1906, which was so badly worded that, construed literally, it prohibited a railroad company from giving passes to its own employees and allowed it to issue passes to the employees of other roads. It finally failed to become a law in spite of the 57,281 votes for and 16,799 against, because the petitioners had neglected to insert an enacting clause.

To this contention that popular law-making does not secure proper deliberation and technical service, the champions of the initiative and referendum reply that even in our legislatures there is very little, if any, real searching debate and criticism on legislative measures, while expert technical service is practically

[1] It will be noted that the progress of the initiative and referendum has been slow since 1912. Only three states, Massachusetts (1918), Michigan (1913), and North Dakota (1914), have joined the list.

lacking except for bills desired by corporations which are willing to furnish their own expert service. They also cite innumerable instances of important laws poorly prepared, badly worded, and sadly deficient in technique, which have been passed after long discussion in representative bodies. The criticism that discussion and deliberation are requisite in law-making does not, of course, apply with the same force to the referendum (which merely secures the reference of a measure duly passed by the legislature) as it does to the initiative, in which case the proposal is drafted by the private parties who demand its submission to the electorate.

The recognition of the necessity for discussion and technical work in wise legislation led to the adoption of a modified scheme in Maine, according to which the legislature may reject any measure proposed by the initiative, enact a competing measure of its own, and submit both to popular approval, permitting the voters to choose between them. "This device," says Mr. Sanborn, "enables the legislature to correct faults in the proposed legislation. The substitute law will undoubtedly be far superior to the initiative bill. The existence of the two bills will, however, complicate greatly the work of the people. Voting upon a single bill is difficult enough; the choosing between competing bills may be much more difficult." [1]

The second leading argument against the initiative and referendum is the frequent lack of interest shown in propositions submitted to popular vote.[2] Mr. Philip L. Allen, in a valuable article, gave the statistics of the popular vote upon seventeen different laws and constitutional amendments and compared that vote with the simultaneous vote for public officers; the vote cast in eight of the seventeen cases was less than fifty per cent of the vote cast for the officers and in only six cases did it exceed sixty per cent. On an amendment to the constitution of Illinois, in 1896, only about one-fifth of the voters for presidential electors expressed any preference; while only about the same proportion of voters acted on a proposed amendment to the constitution of Kansas in 1906. The most notorious instance, perhaps, is that of the Louisiana election of the same year, in which a number of important constitutional amendments were carried into effect by

[1] The Political Science Quarterly for December, 1908, p. 601.

[2] See *Readings*, p. 429.

a vote of only one-sixth of the electors.[1] It is clear that, if a majority of all the voters is required for the approval of a measure, it will be defeated, unless it is of such a character as to arouse an extraordinary interest among the people. Oregon appears to be the only state in which the voters at large seem to take a deep interest in political measures. The vote on proposals referred to the electors of that state in 1906 varied from 63,749 to 83,899, while the vote for governor in that year was 96,715.

Of course, it must be pointed out that the vote for public officers can hardly be deemed a correct measure of public interest in elections, owing to the intense activity of party organizations in getting out the voters; and as Mr. Sanborn puts it, "If those who vote [on referenda] are the most intelligent, if they express the best public opinion, if the influence of the uneducated and the corrupt is substantially eliminated, and if those who vote upon the question vote with intelligence, we may still, in spite of the smallness of the vote, have conditions under which the referendum may be considered as an efficient aid to the work of the legislature." To this contention the advocates of the initiative and referendum add that the slight interest of the voters in important legislative measures is evidence of the sad need for political education, which their system promises to give in time, if properly devised.

At its best, however, legislation by minorities presents grave difficulties. It is very easy to secure the signatures of the small percentage of voters required to initiate a measure, whether it be one of great public significance or a proposal designed to advance the views or interests of a petty and ambitious faction. The proposal may be so worded as not to awaken any general recognition of its true importance, and under the cover of the provision that a mere majority of those voting upon a measure can carry it into effect, a small faction or active group may secure the passage of a law which does not represent even the interest of any considerable portion of the population, or is wholly unadapted to the actual social conditions to which it is intended to be applied.

Indeed, the third argument advanced against the referendum is based on the ground that it is very easy for any pernicious interest in the state, affected adversely by a good law, to secure signatures to a petition demanding a referendum and thus postpone the date

[1] Article by Professor J. W. Garner, Proceedings of the American Political Science Association, 1907, p. 164.

of the law's going into effect for a considerable period — at least until a popular vote could be taken — and, perhaps, through the indifference of the majority defeat it with a solid and active minority. Mr. Sanborn, in the article cited, contends that the recent experience of South Dakota illustrates this objection, because the three measures passed by the state legislature in 1907, on which referenda were demanded, were the acts extending the period of residence necessary to securing a divorce, prohibiting the shooting of quail for a long term of years, and forbidding theatricals, circuses, and similar public exhibitions on Sunday.

Another argument against the initiative and referendum is the contention that responsibility for law-making is shifted from a definite group, known as the legislature, to a large and irresponsible group of persons who mark their ballots within the secrecy of the polling place. If the legislature makes mistakes or fails to reflect popular will, its members can be punished, if the electors are interested enough to defeat those who seek reëlection; whereas it is impossible to fix any responsibility or to punish any one politically, if a badly drawn or unwise measure is passed by a popular vote.

It may be said, however, that so far the system of initiative and referendum has not seriously affected the representative element in government wherever adopted. The fear of the referendum may have driven lobbyists from some state capitals, but it may be questioned whether any important laws have been secured that could not have been obtained through ordinary legislative channels. There can be no doubt that representative government, where wisely and efficiently operated, is the best form of government yet devised. Nevertheless, the initiative and referendum, especially for important matters, have undoubtedly found a permanent place among our institutions.

In saying that the new devices have found a permanent place in American institutions, it should be noted that the very terms "initiative" and "referendum" are vague, and the concrete form which they may take range from extreme radicalism to a conservatism more rigid than the most rigid constitutionalism. The principles behind the initiative and referendum may be worked out into many forms:

I. The initiative may be separated from the referendum, as in Michigan in 1908, where constitutional amendments only could be

initiated by petition and the referendum could be employed only by legislative action.

II. The initiative or referendum may be restricted to statutory enactments, leaving judicial control under the state constitution unaffected.

III. The initiative or referendum may be employed only in the case of constitutional provisions.

IV. The referendum alone may be exercised at the option of the legislature, as was formerly the case in Massachusetts.

V. The referendum may be set in motion by an initiative petition, — by five per cent of the voters or twenty-five per cent.

VI. The referendum on constitutions and constitutional amendments may be compulsory, as is well-nigh universal in the United States to-day.

VII. The initiative may be coupled with a provision that the legislature may submit in addition to any initiated measure an optional provision, giving the voters a choice between the proposal of the private parties and that which has been debated and digested in the legislature.

VIII. The initiative may be coupled with a provision that any measure initiated which may be adopted by the state legislature in due form shall become a law, unless on a petition of the voters a referendum is required.

IX. The number of voters necessary to initiate a constitutional amendment may be fixed at a definite sum or a percentage of the voters, and a larger number may be required to initiate a constitutional amendment than is required to initiate an ordinary statute. For example, in Oklahoma, eight per cent of the voters may initiate a legislative measure, while fifteen per cent are required to propose amendments to the constitution by petition.

X. A differentiation may be made between the number necessary to initiate a new measure and the number required to sign a referendum petition on an act passed by the legislature.

XI. A large number of variations may be made in the number of votes necessary to the enactment of any particular provision into law. It may be a simple majority of all those voting for or against the measure. It may be a simple majority of those voting for and against the measure, providing that majority is equivalent to a certain percentage of all the votes cast for some particu-

lar officer at a general election. A difference may be made between the vote required for the approval of an initiated measure and that required on a legislative enactment referred to the voters on petition; as, for example, in Oklahoma, where a measure referred to the people by the initiative can go into force only when approved "by a majority of the votes cast in such election," while a legislative measure referred to the people by a referendum petition needs to be approved only "by a majority of the votes cast thereon."

XII. The initiative may be restricted, as in a proposed Wisconsin constitutional amendment, by a provision to the effect that it can apply only to measures which have been introduced in regular form in the state legislature — the design of this being to secure a certain amount of legislative consideration of any measure referred to popular approval.

XIII. The initiative may be used to introduce measures into the legislature, as in Ohio, where three per cent of the voters may cause the introduction into the legislature. If it is rejected there, an additional three per cent petition may cause the reference of the measure directly to the voters.

XIV. The initiative and referendum may be accompanied by provisions designed to secure general publicity and to educate the voter, as is the case in Oregon.

XV. Finally, the initiative and referendum may take the milder form of a public opinion bill such as is provided by the Illinois law of 1901 authorizing the submission of any question to popular vote on the initiative of a certain percentage of voters, with the understanding that popular approval of the proposal constitutes merely a pious recommendation to the legislature.

It is obvious from this by no means exhaustive table of variations that any one who dogmatically approves or disapproves the initiative and referendum will have to define his terms before he becomes intelligible. No one in harmony with the spirit of American institutions could flatly declare that he was opposed to the referendum in any form. Indeed, it can hardly be said that a system of initiative and referendum embodies many definite principles that can be intelligently discussed without any reference to the concrete forms in which it appears. One may expound the Maine system or the Oregon system, and give his reasons for approving or disapproving it.

The Recall

Not content with bringing the legislature under the direct control of the electorate, the advocates of popular government have contrived a new device, or rather reconstructed an old institution, known as the recall. The principle upon which it is based is simple, namely, that elected officers are merely agents of the popular will and that the voters should have at all times an opportunity to pass upon the conduct of their representatives. The device itself is a plan whereby a certain number of the voters, whenever they are dissatisfied with the services of a public officer (usually elective officers only), may, on petition, compel the officer in question to stand for a new election and thus submit his claims to the judgment of the electors. The recall began its recent career in the city of Los Angeles, California, where it was introduced in the city charter in 1903. At first it attracted little attention, and then suddenly it sprang into prominence. A state-wide form of the plan was introduced into the Oregon constitution in 1908, and it was seized upon by the makers of commission charters for cities as a useful check on the large powers conferred upon the commissioners. California adopted it for state-wide purposes in 1911, Arizona in 1911–1912, Arkansas, Idaho, Washington, Colorado, and Nevada in 1912; and other states have amendments pending.

Although apparently a simple institution, the recall is susceptible of a large number of variations which affect very considerably its character as a practical instrument: —

I. The percentage required to force an election to recall an officer may be high or low. It is usually about twenty-five per cent, as in Oregon. It is ten per cent in the charter of San Francisco and fifty-five per cent in the commission cities of Illinois.

II. The signers of petitions may be secured by solicitors at their homes or places of business, or they may be compelled to appear before a city official.

III. The recall may be used only once against the same officer under some of the provisions, and under others, as in Oregon, it may be used many times against the same officer, if the sponsors for the second and following petitions pay the expenses of the preceding elections.

IV. The vote required to remove an officer may vary. It may be equal to a majority of all the votes cast at the election at which he was elected in the first instance, or it may be simply a majority of those voting at the recall election. Moreover, the recall election may be divided into two parts: the question of removal may be submitted first to popular vote and this followed by an election to fill the vacancy; or the vote on the recall may simply take the form of an election at which the officer against whom the petition is filed may stand if he likes.

V. The recall may be restricted to administrative officers, and not applied to the judiciary at all, or it may apply to all elective officers (and in one or two instances attempts have been made to apply it to appointive officers).

Although the recall has been in existence for a number of years, it has not been used very extensively. It was employed in Los Angeles in 1904 and again in 1909 to unseat mayors, and in Seattle in 1911 to oust the mayor. It has been used once against a judicial officer, in San Francisco, to oust a police judge who was charged with being too lenient with the vice elements. There are a few other instances of its use in local government, but it has not been brought into play for a state-wide campaign as yet. Although it has been overdone in one or two western cities, the recall seems to be more of "a gun behind the door," as President Wilson characterized it, to be employed in rare emergencies than for everyday use.[1]

Like other instruments of popular government, the recall is to be judged on an experimental basis. Its advocates claim that it gives to the public officers to whom it is applicable a proper sense of responsibility between elections as well as at periodical elections. Its opponents claim that it makes administrative officers think more of politics and temporary popularity than of the efficient conduct of public affairs. It has not been grossly abused, as prophesied, and if it is accompanied by a lengthening of official terms and the cultivation of a healthy and interested public sentiment, it may lead to that increase in executive powers which is necessary to the proper discharge of public duties.

[1] For a practical treatment of the subject see the excellent work, *The Operation of the Initiative, Referendum, and Recall in Oregon*, by Dr. James D. Barnett. On the recall of judges and judicial decisions, see below, p. 552.

Popular Control through the Ballot [1]

Under ordinary circumstances, public control over the government is manifested in the nomination and election of executive and legislative officials — not in making constitutional amendments or operating a system of initiative and referendum. The instrument of control possessed by the average voter, therefore, is his ballot — a fact much neglected in our political literature. Those who are active in party organizations may, of course, bring pressure to bear on certain public functionaries in proportion to their "influence"; but in most instances the penalties of being active in politics are too severe for the man who has no talent in devising summer outings, winter festivals, huckleberry-pie contests and other diversions for keeping his "fellow-citizens" in good humor with the organization.[2] An excess of this kind of "practical politics" constitutes, moreover, a danger to liberty and, by lowering the standard of political intelligence and public interest, tends to make a genuine democracy impossible. Accordingly, the great question of popular control is not how best to keep the rank and file under party discipline, but how to make it possible for the voter with his ballot in hand on election day to become a real factor in determining the character of our government.

Nowhere has the "sovereign voter" received more adulation than in the United States, and nowhere has the power of sovereignty been more frittered away in futile agitations and the collateral incidents of practical politics. We have rightly felt that there was something gratifying and inspiring in the spectacle of the common people rising to the height of self-government; and we have paid wordy tribute to the power of the ballot; but we have made little effort to ascertain what the ballot can really do. We have apparently assumed that it can do everything, from deciding who among ten thousand should be clerk of a municipal court to prescribing what should be done with the surface dirt removed from a street by a public contractor. For more than a century we have been adding burdens to the ballot, until the outcome of the tendency is the paralysis of the very control which popular election is supposed to afford.

[1] Taken from my article, "The Ballot's Burden," in the Political Science Quarterly for December, 1909.

[2] *Readings*, p. 582.

The theory underlying the doctrine that public control can best be secured by establishing as many elective offices as possible is simple enough. A number of men are candidates for a public office. Each of these candidates entertains certain notions of policy with regard to the office he is seeking, and each of them has his own standards of efficiency and integrity. The voters select the one who most accurately reflects the prevailing public sentiment and seems most likely to realize the dominant public desire. If he does not carry out the policy which he is expected to support, or fails to come up to the standards set by his constituents, he is turned out at the expiration of his term (which ought theoretically to be a short one in order to give the people a chance to express their judgment on the officer with great frequency), and some one who more nearly represents the electorate is chosen in his stead. Thus in the long run representative democracy triumphs and popular control is maintained. To question the essential soundness of this view is deemed petty treason by most politicians, and the doubter is met with the firm assertion that the people may be trusted to elect any officer, local, state, or national — an assertion which quite overlooks the fundamental fact that electing *all* of them together is an entirely different matter from electing *any one* of them.

The way in which the multiplicity of elective offices has overburdened the voter until his control has broken down can best be illustrated by concrete examples, which bring home the details of the voters' task. Take, for example, the ballot for the thirteenth and thirty-fourth wards of the sixth congressional district of Chicago in 1906.[1] It is two feet and two inches by eighteen and one-half inches; and it contains 334 names distributed with more or less evenness as candidates for the following offices: —

State treasurer, state superintendent of public instruction, trustees of the University of Illinois, representatives in Congress, state senator, representatives in the state assembly, sheriff, county treasurer, county clerk, clerk of the probate court, clerk of the criminal court, clerk of the circuit court, county superintendent of schools, judge of the county court, judge of the probate court, members of the board of assessors, member of the board of review, president of the board of county commissioners, county commissioners (ten to be elected on general ticket),

[1] Kindly furnished to the author by Professor J. W. Garner of the University of Illinois.

trustees of the sanitary district of Chicago (three to be elected), clerk of the municipal court, bailiff of the municipal court, chief justice of the municipal court, judges of the municipal court (nine to be elected), judges of the municipal court for the four-year term (nine to be elected), judges of the municipal court for the two-year term (nine to be elected).

In Sioux City, Iowa, the following nine elections were held in 1908: —

January 21. Special election on the commission plan of government.

February 24. City primary. Regular biennial election. Candidates nominated for eighteen city offices.

March 9. School election. Regular annual. Two directors and a school treasurer elected. A tax proposition to appropriate $60,000 for a schoolhouse fund also voted on.

March 30. City election. Regular biennial. Eight officers and a council of ten elected, each voter voting for eleven candidates.

May 28. Special election on traction franchise. Franchise defeated.

June 2. Regular biennial election. Candidates nominated for twenty-eight different national, state, and local offices.

August 11. Second special election on traction franchise.

November 3. General election. Regular. Forty-three officials voted for, including thirteen presidential electors, twelve state officers, one congressman, one state senator, two state representatives, nine county and five township officers. Amendment to state constitution also voted on.

November 17. Special election on the Perry Creek and the Bacon Creek conduit and the gas franchise.[1]

Surely the people of the United States believe, with the inhabitants of Lilliput, "that the common size of human understandings is fitted to some station or other, and that Providence never intended to make the management of public affairs a mystery."

Public control must go behind the elections to the primaries, for, as everybody knows, whoever controls the primaries controls the strategic point in our whole election system. Nevertheless, we find that the primaries, whether under the convention

[1] Digested from an excellent statement by F. H. Garver in the Political Science Review, August, 1909.

or direct nomination systems, are, if possible, more complicated than the election machinery. If all of the voters, moved by the appeals of the good government people and stung by the taunts of the bosses, were to appear at the primaries of their parties, they would not be able to change the actual operation of the nomination system; for the preliminary work of the nominations, owing to the intricacies of the process, must be done by the experts — a fact too often overlooked by those who advocate direct nominations as a cure for boss rule.

It is not merely capacity to discriminate between a few hundred candidates that we expect from our sovereign voter; he must now do our legislation for us, down to the minutest detail. An excellent example of this relatively new burden is afforded by the blanket ballot submitted to the voters of the city of Portland, Oregon, at the general municipal election held June 7, 1909. In addition to the modest number of twenty-five names of candidates for the respective offices of mayor, auditor, treasurer, city attorney, municipal judge, and councilman at large, there are thirty-five separate legislative propositions on which the elector must vote "yes" or "no." Some of these are important, and their submission is entirely proper, such as the proposition to establish a commission form of government and to make large bond issues for specific purposes. It is difficult, however, to see why the whole electorate should be asked to ponder and determine whether the municipal judge may appoint a clerk at a salary of not less than $100 per month, whether a woman's auxiliary shall be established in connection with the police department, whether the council may fix the salary of the city engineer at not less than $2400 per annum, and whether the rate of interest on special-assessment arrears shall be raised to ten per cent. In view of the serious task imposed on the voters of the city of Portland by this ballot, the interest shown in the election and the results attained are most creditable; they show a high degree of intelligence and capacity. Nevertheless, the burden was too great; and it is authoritatively stated that there is now on foot a movement to restrict the number of referenda, amendments, and other propositions that may be submitted at any one time to a maximum of twelve.

The simple truth is that the theory of popular control through a multiplicity of elective offices does not work in practice. In the

case of a large number of officers there is no question of policy involved, because their functions are purely ministerial, prescribed by statutes, and their discharge of these functions is enforceable through the ordinary processes of law. No one has been able to discover up to this time why we should select a Republican state treasurer to serve with a Socialist state veterinarian; and it is because the results of state elections, so far as most of the offices are concerned, are of slight importance to anybody except the political experts, that the public is largely indifferent to the qualifications of the minor candidates. The real failure of the democratic theory, however, is due to the fact that it is absolutely impossible for any considerable number of voters to exercise any discrimination among candidates for a large number of offices. It is a matter of common knowledge that in almost every state election the only candidates who are seriously discussed in the press — in other words, the only candidates upon whose qualifications and record any light is thrown — are those seeking the office of governor and, in the case of municipal elections, that of mayor. The candidates for the minor state offices and, what is infinitely more important, the candidates for the city council and the legislature are generally left in the same fog which envelopes the candidates for the position of coroner or clerk of the municipal district court. There are of course exceptions to this rule, but it applies quite generally throughout the United States.

It is simply absurd to expect the voters to apply any standards of discrimination, that is of control, to more than three or four groups of candidates. This is the testimony of many practical publicists. President Woodrow Wilson has described the situation with characteristic felicity of phrase: —

> In the little borough of Princeton, where I live, I vote a ticket of some thirty names, I suppose. I never counted them, but there must be quite that number. Now I am a slightly busy person, and I have never known anything about half the men I was voting for on the tickets that I voted. I attend diligently, so far as I have light, to my political duties in the borough of Princeton — and yet I have no personal knowledge of one-half of the persons I am voting for. I couldn't tell you even what business they are engaged in — and to say in such circumstances that I am taking part in the government of the borough of Princeton is an absurdity. I am not taking part in it at all. I am going through the motions that I am expected to go through by the

persons who think that attending primaries and voting at the polls is performing your whole political duty. It is doing a respectable thing that I am not ashamed of, but it is not performing any political duty that is of any consequence. I don't count for any more in the government of the borough of Princeton than the veriest loafer and drunkard in the borough, and I do not know very much more about the men I am voting for than he does. He is busy about one thing and I am busy about others. We are preoccupied, and cannot attend to the government of the town.[1]

An informing and perhaps somewhat typical census of political interest on the part of voters is printed by Mr. R. S. Childs.[2] An inquiry among the voters of one of the most independent assembly districts in Brooklyn resulted in the following revelations: —

Do you know the name of the new state treasurer just elected? *Yes:* 13 per cent.

Do you know the name of the present state treasurer? *Yes:* 25 per cent.

Do you know the name of the new state assemblyman for this district? *Yes:* 30 per cent.

Do you know the name of the defeated candidate for assemblyman in this district? *Yes:* 20 per cent. (*Knew both of above:* 16 per cent.)

Do you know the name of the surrogate of this county? *Yes:* 35 per cent.

Do you know the name of your alderman? *Yes:* 15 per cent.

Do you know whether your alderman was one of those who voted against the increase in the police force last year? *Yes:* 2 per cent.

Nominations, however, must be made and the offices must be filled. Somebody must discover when each officer's term expires and see to it that the names of the candidates are on the ballot in due form, in accordance with the provisions of the election law, which usually equals in bulk and complexity a

[1] *Civic Problems*, an address delivered March 9, 1909, at the Annual Meeting of the Civic League of St. Louis. For additional literature on the subject see Gamaliel Bradford, *The Lesson of Popular Government*, Vol. II, pp. 417, 456, 467; Charles F. Dole, *The Spirit of Democracy;* Albert Stickney, *Democratic Government, A True Republic and the Political Problem;* C. C. P. Clark, *The Machine Abolished;* L. S. Rowe, *Problems of City Government*, pp. 52, 174, 181, 201; Goodnow, *Politics and Administration;* R. S. Childs, "The Short Ballot," Outlook, July 17, 1909.

[2] The Outlook, July 17, 1909.

moderately comprehensive treatise on the British constitution. Here is a large, important, and possibly lucrative function to be discharged; and since the "sovereign" voters have failed, as they could not but fail, to discharge it intelligently and efficiently, the politicians have taken the matter into their hands. The result has been the creation of a structure to correspond with the function — the peculiarly American party organization as an office-filling and spoils-sharing device.

This system has not only paralyzed the ballot, but it has also perverted the political party from its true function, which is to reflect and formulate the policy of the various cohering groups within each political area. The political party in the United States, whatever may have been its historic rôle, has become a standing army of regulars, doing the work which the electorate is supposed to do and in too many cases reaping the advantages which should accrue to the public. The party is an office-filling machine, dealing in the salaries of offices and the privileges which they confer; and it is the democratic system of popular election, intended to establish the rule of the people and commonly supposed to realize this intention, which in fact prevents the people from ruling steadily and effectively.

It is the opaque, persistent, adamantine party organization which has been the bane of our political life. Many of the best men are wholly excluded from the state legislatures and from minor offices because of the necessity of coming to terms with the standing army of experts. Many otherwise efficient and independent men are compelled to use their offices to advance the interests of the organization which nominated and elected them. Those private interests which have corrupted our politics have worked through the extra-legal organizations rather than through the officials chosen by the voters. It is needless, however, to dwell further on a thesis which has been conclusively established.[1]

General recognition of the fact that our political machinery has fallen into the hands of groups of experts, and that the ballot at the regular elections is only a ratification of the "slates" made by the experts and not the expression of the will of the voters, has been followed by popular resentment, and by the demand that means be found for expressing and enforcing the general

[1] See Goodnow, *Politics and Administration*.

will. In answer to this demand has come the great wave of "direct nomination" and "direct government" legislation which is sweeping over the country. Much of the criticism of these two reforms is due to a misapprehension of the forces which have called them into life. Each of these reforms has its justification in the practical experience of the people; each of them is largely due to an awakening political consciousness which it is desirable to cultivate; and, if not pushed to extremes, neither of them is a departure from approved political experience. But neither of these reforms can make party government in the United States flexible, representative, and responsible. Indeed, they may only worse confound the already tremendous confusion.

If the analysis of our political difficulties indicated in this chapter is correct, namely, that the weight and inflexibility of our party machinery are due to the number of elective offices to be filled at each election, then the direct nomination device will duplicate the present complicated mechanism and will render it necessary to have abler experts, who understand not only the mysteries of the regular election law, but the added mysteries of the primary law as well. The ordinary primary law provides for the election of several committees, establishes an intricate system for getting names on the primary ballot, and adds a long series of penal provisions. The Hinman-Green measure, which was defeated in the New York legislature in 1909, is perhaps the only primary bill which has sought to simplify in any way the older system. In most states the primary law is a booklet of no mean proportions and, taken in connection with the ordinary election law, is enough to stagger the experienced student of law and politics, to say nothing of the inexperienced voter for whose guidance it is devised. The initiative also creates more machinery and broadens the already Brobdignagian ballot. With petitions for nomination, petitions for initiative and referendum, primary elections and regular elections, it looks as if the sovereign voter in securing ostensible control over everything had actually lost control over everything.

The fact is, we have tried in the United States almost every scheme known in the history of politics except simple, direct, responsible government. By a strange perversity of fate, the fear of democracy and the passion for democracy have led to the same result — the creation of a heavy and complicated

political mechanism, yielding quickly enough to the operations of the political expert and blocking at every turn the attempts of the people to work it honestly and efficiently. Powerful private interests find their best shelter behind a multiplicity of barriers, politicians have no desire to make plain the rules of the game, and reformers generally attack corruption or inefficiency by adding some new office or board of control. As an outcome, we now have such a complex of offices, commissions, caucuses, primaries, conventions, and elections that the ordinary citizens, engrossed in the struggle for a livelihood, have been unable to maintain control over their own government, and it has fallen more and more completely into the hands of the professional politician, aptly described by Mr. R. S. Childs as one "who knows more about the voter's political business than the voter does himself." Before we can accomplish any considerable reform in the conduct of state or municipal affairs under the present system, it is generally necessary to break down a controlling organization of experts; and to do this we must create another organization of experts which, for one reason or another, generally becomes as bad as that which it has displaced. And so the endless warfare of American politics goes on, dissipating the energies that might be devoted to the work of government in more or less fruitless contests over the possession of its mechanism.

There are, however, a few indications that some portions of the electorate are becoming dimly conscious that the political instruments with which they are attempting to wage the battle of democracy are wholly unsuited for the fray. The recent tendency to exalt the executive [1] is doubtless due principally to the feeling on the part of the voters that the best way to secure results is to concentrate attention on, and to work through, the executive, rather than to waste time in contests over a multitude of offices. The important reforms achieved in some states by this process and the wholesome effect which it has had in arousing the political consciousness of the people are beyond question. But this tendency toward executive government is extra-legal, and it is not without its dangers for the representative system, which is, in the long run, the real safeguard of democracy. Nevertheless, the movement has demonstrated that the American

[1] *Readings*, p. 442.

people have an interest in, and a capacity for, real politics, as distinguished from the pettifogging of the office-mongers or the intrigues of privilege-seekers; and it has also shown that our public opinion can translate itself into action when it operates upon a simple piece of mechanism. The lesson of this is surely obvious: the ballot should be so simplified as to concentrate the public attention upon the choice of a few powerful and responsible officers.

Representative, responsible, efficient government is our goal; and the way to it lies not through additional and more complicated political machinery, but through such a simplification of our present machinery as will permit the electorate to bring steady and persistent pressure on the great organs of government in the broad daylight of interested public discussion. This truth has been recognized by the most careful students and observers of our system of government.

President Wilson, in the address quoted above, puts the argument trenchantly: —

> Elaborate your government; place every officer upon his own dear little statute; make it necessary for him to be voted for; and you will not have a democratic government. Just so certainly as you segregate all these little offices and put every man upon his own statutory pedestal and have a miscellaneous organ of government, too miscellaneous for a busy people either to put together or to watch, public aversion will have no effect on it; and public opinion, finding itself ineffectual, will get discouraged, as it does in this country, by finding its assaults like assaults against battlements of air, where they find no one to resist them, where they capture no positions, where they accomplish nothing. You have a grand housecleaning, you have a grand overturning, and the next morning you find the government going on just as it did before you did the overturning. What is the moral? . . . The remedy is contained in one word: *simplification*. Simplify your processes, and you will begin to control; complicate them, and you will get farther and farther away from their control. Simplification! simplification! simplification! is the task that awaits us; to reduce the number of persons to be voted for to the absolute workable minimum — knowing whom you have selected; knowing whom you have trusted; and having so few persons to watch that you can watch them.

It would be possible to summon a host of witnesses, publicists, men of affairs, and practical politicians, in support of the

doctrine that our elective system has been so overdone that it has ceased to be in fact an elective system and has become the prize of the expert. It would be possible to show a number of instances in which corrupt influences have actually sought the establishment of elective offices for the very purpose of taking the control of them out of the hands of the electorate.[1] It would be possible to demonstrate that no other country in the world wastes so much of its best political energy in overcoming the friction of its governmental machinery. But it seems a work of supererogation to push the argument farther.

The effort to attain a ballot short enough to assure real popular control should begin in a reform of the central government of the state, by giving the governor power to appoint all of the executive officials, just as the President of the United States appoints the heads of departments. No good reason can be advanced why purely administrative officers like auditors, treasurers, and secretaries should be elected, for they have no large discretionary power and no share in shaping the policy of the administration. If the lieutenant-governor is made the presiding officer of the upper house of the state legislature, some reason may be advanced for making the office elective; but it would be better to allow the Senate to elect its own president. It often happens that the governor is at loggerheads with the very men who are to assist him in "the faithful execution of the laws," because they belong to the different political parties or, what is often worse, to contending factions within the same party. In more than one instance a governor has been on such unfriendly terms with his attorney-general that he has not dared to ask his advice on any serious legal question. The desirability of the proposed concentration of power is becoming more apparent as executive functions increase in number and complexity, and as the necessity of efficient and responsible administration becomes clearer. More than one governor, possessed of large practical experience and animated by a sincere desire to establish efficient administration, has called attention to the anomaly of our disintegrated administrative system. Only a governor obsessed by the theory of

[1] S. E. Moffett, "The Railroad Commission of California," Annals of the American Academy of Political Science, Vol. VI, pp. 469 *et seq.*; J. R. Commons, "The La Follette Railroad Law," Review of Reviews, Vol. XXXII, pp. 76 ff.

popular election or unwilling to assume the reponsibility of his office can deny the necessity of greater centralization.[1]

In the sphere of municipal government there are already marked tendencies in the direction of simplification.[2] All the recent charters of our large cities are increasing the appointing power of the mayor and giving him a larger place in the scheme of municipal administration. What New York has done in this regard is a matter of common knowledge. The report (1909) of the Boston Finance Commission recommends "a simplified ballot with as few names thereon as possible; the abolition of party nominations; a city council of a single small body elected at large; the concentration of executive power and responsibility in the mayor; the administration of departments by trained experts or persons with special qualifications for the office; full publicity secured through a permanent finance commission." The principle of simplification was embodied in the Boston charter of that year.

The commission form of government, which is rapidly winning public favor, is an extreme form of simplification; in fact, such an extreme form that there are grave objections to it. No government, state or municipal, is merely concerned with business-like and "economical" administration, as some of our mercantile statesmen would have us believe. There are always large policies to be determined affecting liberty and property, and here is where the representative, deliberative element has its legitimate and indispensable function. Any scheme of government that ignores it is bound in the long run to fail.

It is not likely that the voters in rural counties would welcome any simplification that would take from them the privilege of voting for a long list of county officers; although, as Professor John A. Fairlie, has pointed out, the so-called elective offices in county government are not all filled by real election. In the counties there is perhaps less need of simplification than in the more populous urban centres where the personal element in politics is not so marked; and while the appointing power of the county board might well be increased to cover all the county offices except those of the sheriff and prosecuting attorney, it is not certain that such a change is requisite or even desirable. If county elections are separated from state elections, it

[1] Below, p. 507. [2] See below, chap. xxvii.

will hardly be necessary to overturn a system which has so long existed unchallenged; although persons who have had practical acquaintance with "court-house rings" will from time to time be moved to advocate drastic reform in rural government also.

The ballot may be simplified, of course, by another method than that of reducing the number of elective offices. The number of elections may be increased. County, municipal, state, and national elections may be separated, — in those states where political experiments are not viewed with alarm they are already being separated, — and the terms of officers may be so lengthened that the voter will not be confronted annually or biennially with too long and too bewildering a list of names. It is conceivable that this change may be combined with a decrease in the number of elective offices. Thus, by lengthening terms, separating elections, and making the minor offices appointive, the desired ballot reform may perhaps be accomplished without disturbing too violently those Jeffersonian traditions which still have so strong a sway over the minds of our fellow-citizens.

The results of any proposed reform in institutions are always highly problematical, so elusive are the collateral forces which come unexpectedly into play after it has been accomplished.[1] Nevertheless, if one confines himself to predicting "the main chance of things," he may prophesy "with a near aim." By eliminating wholesale nominations, a drastically simplified ballot ought to decimate the ranks of the expert office-fillers and thus help to break down that closely knit extra-legal organization through which some of the most malignant interests in American politics have operated. This simplification of our party organization, accompanied by close legal control, including direct nominations in some form, would surely make our scheme of government more transparent to public gaze and ought to save not a little of the enormous amount of energy that is now spent in fighting organizations — that is to say, in marking time. It would, in fine, uncover the enemy and let the voters see, not only the line of battle, but also the plan of campaign.

The simplification of the ballot ought so to simplify our politics

[1] No legislator at Albany, for example, foresaw the famous "Raines hotel sandwich" when the Raines bill was under consideration.

that a larger number of citizens would understand their own government. It would enable the citizen to do his political work with a minimum amount of activity; activity in itself, some of the new prophets notwithstanding, being no virtue. Man is not made for the state, if we eschew German political science, but the state for man. There is no merit in fighting sham political battles over organizations and personalities — the chief business in the American governing process as now constituted. At all events it would be difficult to convince most people that it is more virtuous to spend the best part of the year in trying to oust an incompetent state veterinarian, placed in office nominally by popular election, but in reality by the "slate makers," than it is to read Dean Swift or Rabelais or to play chess. The point is to get a state veterinarian who knows his business, not to keep civic virtue at a certain degree of temperature by political exercise.

Finally, this simplification of politics and reduction in the weight and complexity of our party organization — a programme which by no means includes the destruction of party organizations — ought to have a wholesome effect in giving us some real politics at our city halls and state capitols instead of the sham politics of warfare between "reformers" and "bosses" — the distinguishing futility of American political life.

CHAPTER XXIV

THE STATE EXECUTIVE DEPARTMENT[1]

The Office of Governor

In no branch of the state government have we departed further from the example set by the first state constitutions than in the executive department. This has been due in part to social and economic changes which have multiplied administrative offices, and in part to a growing distrust of the legislature and an increasing confidence in the governor. In their contest against British dominion, the colonists had used their legislatures with great effect against the provincial governors, and it was only natural that, after securing independence, they should have regarded the executive with great jealousy, and looked rather to the legislature as the safeguard of their liberties. At the outset, therefore, the governor was a mere nonentity, or at best a servant of the legislature; but from this position of political insignificance, the office has been gradually raised by the addition of new powers and duties, until to-day the governor of the state possesses a constitutional and administrative authority of no mean proportions; and when he becomes, as he may, the representative of great popular interests he not only overshadows the legislature, but sometimes springs into prominence as a national figure.[2]

Notwithstanding this increase of power, the governor, in his relation to the state administration, does not yet possess any such high authority as is vested in the President of the United States by the Constitution. The national executive office was created by men who feared the usurpation of all power by the legislature, and placed their hopes in the controlling influence of an energetic executive elected in an indirect manner. The best principles of the Federalists, especially those relating to efficiency and strength

[1] The principle of separation of powers is applied in our state governments as well as in the federal government. Above, p. 152.

[2] See *Readings*, p. 442.

in a government, have been unhappily too often discarded along with the doctrines of class rule by our state constitution-makers in their haste to avoid everything which did not have at least a democratic appearance according to the tenets of the Jeffersonian school. Consequently, we have not yet given the governor the control over state administration which is required for the efficient and responsible conduct of an executive business greater than that which fell upon our early Presidents.[1] It must be remembered that the population of the state of New York alone is now greater than that of the entire nation at the beginning of the new federal government. That commonwealth also now has an army of about 20,000 state employees — many times the number under Washington at the close of his first administration.

In all of the states except Mississippi[2] the governor is elected by direct popular vote, the plan of selection by the legislature having been abandoned long ago. In a few states, the candidates for the office of governor are nominated by party conventions composed of delegates apportioned among the counties or other subdivisions of the state according to party vote, or population, or some arbitrary rule. New York retains the convention for drafting the party platform, but uses the direct primary for choosing candidates. The convention is entirely unofficial, that is, is not controlled by the law of the state as to the number, distribution, and election of the delegates. In a large number of states (Nebraska, Wisconsin, Kansas, Oregon, Oklahoma,[3] etc.) the state convention has been abolished by law, and each party is compelled to select its candidates for governor and other state offices by direct vote, usually of the enrolled party members. This "direct primary" is like an election within each party. For example, any Republican who wants to be a candidate for the office of governor must get his name on the primary ballot of his party by securing the signatures of a certain number of Republican voters to a petition; and on primary day, each Republican may designate one among the several persons whose names are thus placed on the ballot as his choice for the Republican candidate for governor at the next ensuing general election. The person receiving the highest number of votes at this primary is

[1] For Governor Hughes' view of this, see *Readings*, p. 436.

[2] In this state there is a curious indirect process.

[3] See below, chap. xxx.

declared to be the official Republican candidate, and his name is then printed on the regular election ticket along with the names of the candidates of other parties selected in the same manner. The nominees of the several parties are then placed before the voters of the state at a general election. It is now the commonly accepted practice to declare that candidate for governor elected who receives the highest number of votes — not necessarily a majority.[1]

In New York, the governor must be thirty years of age, and this is the rule for all except a few states. Citizenship and a term of residence in the state (five years in New York) are almost unvarying qualifications. Some states stipulate that the governor cannot be reëlected to succeed himself; Indiana, for example, provides that he shall hold office for four years, but shall not be eligible for more than four in any period of eight years. Other states, however, place no limitation whatever on the number of terms which a governor may serve; but general practice has fixed it at not more than two terms, though the third-term rule is by no means so absolute as in the case of the presidency. It is a customary practice also to forbid the governor to hold any federal office during his term of service; and Alabama, California, and Utah provide that he shall not be elected to the United States Senate during his term of office.

Twenty-three states fix the governor's term [2] at four years, and twenty-four at two years; Massachusetts, in 1920, gave up the ancient practice of holding annual elections; and New Jersey alone has a triennial election. The tendency is strongly in the direction of the longer term; even the constitution of Oklahoma, which reflects in many clauses the spirit of the Jeffersonian democracy, fixes it at four years. This is the result of the recognition of the patent fact that the governor must have time at least to master the details of the complicated system over which he presides if there is to be an efficient administration. No considerable attempt, however, has been made to coördinate the governor's term with those of the administrative officers whom he may appoint. In fact, the terms of the latter are frequently longer than the governor's.

[1] Most of the states provide that, in case of a tie, the legislature, in joint session, shall choose from among the leading candidates.

[2] See table on the next page.

GOVERNORS OF THE STATES

States and Territories	Capitals	Term of Service	Expiration of Term	Salary
STATES		YEARS		
Alabama	Montgomery	4	Jan., 1923	$5,000
Arizona	Phoenix	2	Jan., 1921	6,500
Arkansas	Little Rock	2	Jan., 1921	4,000
California	Sacramento	4	Jan., 1923	10,000
Colorado	Denver	2	Jan., 1921	5,000
Connecticut	Hartford	2	Jan., 1921	5,000
Delaware	Dover	4	Jan., 1921	4,000
Florida	Tallahassee	4	Jan., 1921	6,000
Georgia	Atlanta	2	June, 1921	5,000
Idaho	Boise	2	Jan., 1921	5,000
Illinois	Springfield	4	Jan., 1921	12,000
Indiana	Indianapolis	4	Jan., 1921	8,000
Iowa	Des Moines	2	Jan., 1921	[1] 5,000
Kansas	Topeka	2	Jan., 1921	5,000
Kentucky	Frankfort	4	Dec., 1923	[2] 6,500
Louisiana	Baton Rouge	4	May, 1924	7,500
Maine	Augusta	2	Jan., 1921	5,000
Maryland	Annapolis	4	Jan., 1924	4,500
Massachusetts	Boston	2	Jan., 1922	10,000
Michigan	Lansing	2	Jan., 1921	5,000
Minnesota	St. Paul	2	Jan., 1921	7,000
Mississippi	Jackson	4	Jan., 1924	5,000
Missouri	Jefferson City	4	Jan., 1921	[3] 5,000
Montana	Helena	4	Jan., 1921	7,500
Nebraska	Lincoln	2	Jan., 1921	2,500
Nevada	Carson City	4	Jan., 1923	7,200
New Hampshire	Concord	2	Jan., 1921	3,000
New Jersey	Trenton	3	Jan., 1923	10,000
New Mexico	Santa Fe	4	Jan., 1921	5,000
New York	Albany	2	Jan., 1921	[3] 10,000
North Carolina	Raleigh	4	Jan., 1921	[4] 6,500
North Dakota	Bismarck	2	Jan., 1921	5,000
Ohio	Columbus	2	Jan., 1921	10,000
Oklahoma	Oklahoma City	4	Jan., 1923	4,500
Oregon	Salem	4	Jan., 1923	5,000
Pennsylvania	Harrisburg	4	Jan., 1923	10,000
Rhode Island	Providence	2	Jan., 1921	8,000
South Carolina	Columbia	2	Jan., 1921	3,000
South Dakota	Pierre	2	Jan., 1921	3,000
Tennessee	Nashville	2	Jan., 1921	4,000
Texas	Austin	2	Jan., 1921	4,000
Utah	Salt Lake City	4	Jan., 1921	6,000
Vermont	Montpelier	2	Jan., 1921	3,000
Virginia	Richmond	4	Feb., 1922	5,000
Washington	Olympia	4	Jan., 1921	6,000
West Virginia	Charleston	4	Mar., 1921	[3] 5,000
Wisconsin	Madison	2	Jan., 1921	5,000
Wyoming	Cheyenne	4	Jan., 1923	4,000

[1] Also $1 200 per annum as a member of the council and $600 rent allowance.

[2] In addition to residence and $3000 for expenses.

[3] And use of executive mansion.

[4] Also water, lights, servant hire, etc., for mansion, and $600 for traveling expenses.

[5] Also $50 per month for rent of executive mansion.

The salary paid to the governor is sometimes fixed by the state constitution, but many commonwealths, following the example of the federal Constitution, leave the amount to the discretion of the legislature. About half the states pay the governor $5000 or more a year. The constitution of New York has placed his compensation at $10,000, but stipulates that the legislature shall provide "a suitable and furnished executive residence."

The formal powers enjoyed by the governor must be sought in the express terms of the constitution. The legislature possesses every power and authority not denied to it; but the governor has no such high prerogative. The customary clause that "the executive power shall be vested in a governor" bestows upon him practically no authority that is not explicitly conferred somewhere by the written instrument itself. As Professor Goodnow puts it: "Little if any power is to be regarded as vested in the governor as a result of the grant to him of executive power. . . . The state courts have not derived, as has the Supreme Court of the United States, any very large powers from such a general power or duty as the duty to see that the laws be faithfully executed. In other words, the principle of narrow construction is more commonly adopted with regard to the powers of the governor than with regard to those of the President."[1]

Powers of the Governor in Relation to the Administration

The state constitution generally vests the "executive power" in the governor and charges him to take care that the laws are faithfully executed. In the enforcement of the law, the governor has to deal with private persons and with the public officials. In the former instance, he acts directly in important matters, by ordering the state's attorney to proceed in the proper court against offenders; or, when there is a riot or other disorder too serious for the regular processes of the courts, he may declare martial law in the region affected and employ the militia of the state.[2]

In the ordinary course of law enforcement the governor of the American commonwealth stands in a peculiar position. Unlike the federal administration, in which substantially all the officers are grouped in proper divisions and subdivisions under heads of

[1] *Principles of the Administrative Law of the United States*, p. 95. *Readings*, p. 432.

[2] *Readings*, p. 449.

departments selected by the President personally and removable by him at will, the state administration is not organized in a hierarchical form, but consists of a large number of officers, bureaus, commissions, and boards, some elective and some appointive, each with its appropriate duties prescribed by law. The head of a department is not a head at all in the sense in which the term is used at Washington. Compare, for example, the Secretary of the Treasury of the United States with the treasurer of New York. The former is appointed by the President, and in his department are grouped the revenue and disbursing officers, the federal banking authorities, and, in short, all the federal officers dealing with taxation, revenues, and finance. The treasurer of New York is elected by popular vote; he is custodian of the moneys paid into the treasury and he pays out on proper warrants; he is commissioner of the land office, a member of the canal board, a trustee of Union College, a member of the state board of equalization, and some other boards. The supervision of banking, insurance, excises and assessments, and taxation is in the hands of single officers or boards appointed by the governor with the consent of the senate and removable only by the consent of that body. If the treasurer does not do his duty, the governor may temporarily suspend but cannot remove him; he can only institute tedious legal proceedings against him. To control the state financial administration, the governor has not merely to watch the treasurer, he must watch all of the various independent officers and commissioners, whom he may not have chosen in the first place and whom he cannot remove at will. There is accordingly, as Governor Hughes put it, "wide domain of executive or administrative action over which he has no control or slight control." [1]

One of the primary effects of this decentralization is to prevent that harmonious coöperation among the various chief administrative officials which is so marked in the President's cabinet. Of course, it sometimes happens that all of these officials are of one political party and represent a coherent section of that party; but it also often happens that the governor is the "drawing card" on the party ticket, while obscure machine workers with no administrative capacity and sometimes with little integrity are associated with him as candidates for the minor state execu-

[1] *Readings*, p. 436.

tive offices. There is at least one instance in our history of a governor's being afraid to trust to legal advice of the attorney-general of his state on account of the strong factional feeling which existed between them. This form of antagonism is often more marked when the governor represents one party and his immediate associates another.

The inherent defects of such a disjointed administrative system are obvious, and there is a tendency in a few states, notably Massachusetts, Illinois, Nebraska, and Idaho, to combine more lines of executive control in the hands of the governor. This tendency is not universal and persistent, however, for many of the states are continuing the older policy of making the new commissions elective and independent of the governor's authority.[1] Nevertheless, the appointing power of the governor is on the increase, especially in the East. This is not entirely due to the conscious recognition of the relation between administrative centralization and efficiency, but is partially on account of the physical impossibility of making all state officials elective.

Where the appointing power is vested in the governor it is often shared by the upper house of the legislature. In New York, for example, the governor and senate appoint the superintendents of the insurance and banking departments, the excise commissioners, the members of the two public service commissions, the superintendent of public works, the commissioner of agriculture, the commissioner of health, the civil service commission, and several other important state officials. Their terms vary in length — practically all of them being longer than the governor's — and in general the governor must have the consent of the senate in order to remove them. The chief exception is the public service commissions, the members of which can be removed by the governor without the consent of the senate.[2]

In some states the legislature itself exercises a considerable appointing power. For example, in New Jersey, Delaware, and four other states the state treasurer is chosen by the legislature.

A slight step, however, in the direction of strengthening the governor's administrative control has been taken in many states, by vesting in him the power to make special inquiries into the

[1] See below, p. 508.

[2] The superintendent of public works and superintendent of prisons are removable by the governor alone, after a hearing.

working of the various executive departments. The constitution of Montana, for example, provides that "The governor may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices, which information shall be given upon oath whenever so required; he may also require information at any time, under oath, from all officers and managers of state institutions upon any subject relating to the condition, management, and expenses of their respective offices and institutions, and may, at any time he deems it necessary, appoint a committee to investigate and report to him upon the condition of any executive office or state institution."

The constitution of Georgia makes it obligatory upon the governor to examine under oath, quarterly or even more frequently, the treasurer and comptroller-general on all matters pertaining to their respective offices and to inspect and review their books and accounts. Occasionally, but not often, the governor is given power to suspend certain state officers during a recess of the legislature. The governor of New York, for example, may temporarily suspend the treasurer whenever it shall appear to him that that officer has violated his duty in any particular; and under the Moreland act of 1908 he may order an investigation of any department. In several states, the various officers are required to make periodical reports or render opinions in writing to the governor, but these are generally perfunctory, or at best of slight significance in advancing the governor's power of control over the administration.

The governor is commander-in-chief of the armed forces of the state, and in case of an extraordinary disturbance beyond the control of the regular officers of the law he may call out the state militia to restore order. Usually in this connection he has the power of suspending the writ of habeas corpus, thus staying the processes of courts and placing the life and property involved in the disorder in the care of the military authorities. Most states declare that the writ of habeas corpus may not be suspended unless in times of rebellion and invasion when the public safety may require it. Two of the states stand with Oklahoma in providing that the writ shall never be suspended by the authorities of the state, thus leaving it always open to persons claiming that their rights are infringed by the military to appeal to judicial tribunals.

Relation to the Legislature

It is a regular practice to confer upon the governor the duty of communicating with the legislature on the state of the commonwealth and of recommending such legislative measures as he may see fit. This right, like that enjoyed by the President,[1] may become a powerful instrument in presenting issues to the people and in forcing the legislature to act. "It is not," said Governor Hughes, "his constitutional function to attempt, by use of patronage or by bargaining with respect to bills, to secure the passage of measures he approves. It is his prerogative to recommend and to state the reasons for his recommendation, and in common with all representative officers, it is his privilege to justify his position to the people to whom he is accountable." The governor, in his message, often sets the tasks for the legislature; and in case of the refusal of that body to accept his proposals, he may, if he is confident of popular support, take advantage of the important power of calling a special session of the legislature to consider the particular measures he has at heart.

While it was long a common practice for the governor to include in his regular message to the legislature a statement of the finances of the commonwealth, legislation in a great majority of states now requires him to present to the legislature a complete program of revenues and expenditures — a budget, in short.[2] This task may be met in a perfunctory fashion or the governor may assume genuine leadership in the formulation of fiscal policies. Taken in connection with the power (which many governors have) to veto single items in appropriation bills, it may become an important instrument in the hands of a strong governor who has a decided policy of his own.

The power of calling extraordinary sessions of the legislature is now regularly conferred by the state constitution, and often the governor is bound to submit to the legislature the proposals to be considered at such sessions. The governor may "on extraordinary occasions," the constitution of Ohio provides, "convene the general assembly by proclamation, and shall state to both houses when assembled the purpose for which they

[1] See above, p. 199.

[2] Mr. A. E. Buck, National Municipal Review for September, 1919.

have been convened." The New York constitution expressly stipulates that no subject shall be acted upon by a special session except such as the governor may recommend, and thus the legislature cannot evade the issue which the governor has set.[1] It may of course reject the measure or measures which he proposes or it may adjourn without taking any action. At all events however it is forced to debate and vote under the direct observation of a public intensely interested in the outcome. An issue is thus set which can hardly be evaded at the next election. The practical significance of such a power in the governor's hands calls for no further comment.

An inquiry recently addressed to the governors of a number of states resulted in some interesting conclusions on this point of executive influence over the legislature.[2] It appears that, with few exceptions, the legislatures generally follow the suggestions of the governors with regard to particular matters of legislation, but not merely because the proposals come from the chief executive. The legislatures really respond to an imperative public opinion which is reflected in the policies of the governor, who, by virtue of his high position, is best able to gauge the popular temper. One governor urged that whenever the executive of a commonwealth desires certain laws, he should lay his plan before the legislature in the form of a carefully drafted bill, and then interest influential men in the measure, acquainting them with the arguments for and against it. Another governor replied: "The legislature of the present year enacted into law practically all the measures suggested by the governor in his message to that body. I mention a few of these as indicating the general character of the legislation in several of the states: the anti-pass bill, two-cent fare bill, prohibiting contributions by corporations for political purposes, primary election bill, joint freight rate bill, child labor bill, extension of pure food law, resolution asking Congress to call a convention for amendment of Constitution so that United States Senators may be elected by the people." The authors who conducted this investigation conclude: "There is certainly no menace in the power of the chief executive of the commonwealth. He has too little. Greater centralization of administrative power and unity of effort are here desirable. But

[1] *Readings*, p. 447.

[2] Finley and Sanderson, *The American Executive*, pp. 181 ff.

at the same time it is manifest that he has ceased to be in some states, if not in all, the 'mere hands of the legislative brain,' as Mr. Bryce characterizes him, whose merit 'is usually tested by the number and boldness of his vetoes.' "

With one exception, North Carolina, all states give the governor the power to veto measures passed by the legislature and also permit the legislature to override a veto by a repassage.[1] About two-thirds of the states, at the present time, require a majority of two-thirds in both houses to overcome the governor's veto; Delaware, Maryland, and Nebraska fix the majority at three-fifths; and a few permit repassage by a mere majority vote. In the hope of checking the extravagance of the legislatures, more than half of the states authorize the governor to veto single items in appropriation bills, and in three states, Washington, Virginia, and Ohio, the governor may even veto a part or parts of any measure.[2]

It is customary, in case of an exercise of the veto power, for the governor to return the bill to the house in which it originated with a statement of his objections. As in the case of the national executive, it is generally understood that the governor may veto measures out of accord with his policy as well as measures which are clearly unconstitutional. "The plain intent of the constitution," says Governor Hughes, "is that the governor shall express his judgment upon legislative measures before him and that his judgment shall control unless the measure is so strongly supported that it counts in its favor two-thirds of the members of the legislative houses after the objections have been formally stated." [3]

In addition to his executive and legislative functions, the governor generally enjoys the quasi-judicial function of issuing reprieves, commutations, and pardons. In some states he exercises it in conjunction with the legislature or the upper house of

[1] *Readings*, p. 444.

[2] The time given the governor to consider legislative measures varies from three to ten days; but, of course, he knows about all important bills from the time of their introduction to their final passage. In case of the adjournment of the legislature, in New York and some other states, the governor is given thirty days to consider measures submitted to him, and if any bill is not approved by him within that time it fails to become a law. Dealey, *Our State Constitutions*, pp. 31 ff.

[3] Inaugural Address, 1909.

that body; in other states it is shared by a board of pardons; and in several the governor is made solely responsible.

In Pennsylvania, for instance, the governor has the power to remit fines and forfeitures, to grant reprieves, commutations of sentence, and pardons, except in cases of impeachment; "but no pardon shall be granted nor sentence commuted, except upon the recommendation in writing of the lieutenant-governor, secretary of the commonwealth, attorney-general, and secretary of internal affairs, or any three of them, after full hearing, upon due public notice and in open sessions, and such recommendation, with the reasons therefor at length, shall be recorded and filed in the office of the secretary of the commonwealth," New York, however, has accepted the great argument of Hamilton,[1] that a single person is the best depository of such an important power because, being alone responsible, he dreads charges of weakness or connivance and is not likely to be so obdurate as a group of men. That state, therefore, gives the governor sole power to grant reprieves, commutations, and pardons, after conviction, for all offences except treason and cases of impeachment, with such restrictions and limitations on its exercise as he may think proper.[2]

The State Administrative System

The administrative officers of a commonwealth fall into two groups: the older officers, such as the secretary and treasurer, and the newer officers, such as the commissioner of labor and superintendent of banking, whose functions are the outgrowth of recent social and economic development.

I. Among the first group (usually elected by popular vote) are the following:

(1) A majority of the states have a lieutenant-governor who is the legal successor of the governor in case of the death, impeachment, or disability of the latter. The lieutenant-governor is also generally president of the senate, with a casting vote. In those states where there is no lieutenant-governor, it is the common practice to designate the president of the senate or the secretary as the successor in case of a vacancy in the office of governor.

(2) All commonwealths have a secretary of state whose func-

[1] *The Federalist*, No. XXVI. [2] *Readings*, p. 448.

tions are pretty much the same everywhere. He is the custodian of the state archives; he has charge of the publication and distribution of laws; he is generally keeper of the election records, issues notices for elections, and supervises the compilation of election returns for state offices. In some states he issues certificates of incorporation to companies formed under the general laws, including banking and insurance companies; he reports annually to the legislature on a large number of subjects as ordered by law or by legislative resolution; he administers the oath to members of the legislature and other state officers; he is *ex officio* member of certain boards and commissions; and he is the custodian of the great seal of the state.

(3) Every state has a treasurer who is the keeper of the moneys accruing to the state from taxes, fees, and other sources of revenue and who, on proper warrants based in due form upon legislative appropriations, pays out the money of the state.

(4) In most states there is an auditor or comptroller. In general, we may say, the comptroller audits all accounts against the state, draws warrants on the treasury for the payment of moneys as directed by law, designates the banks in which public funds are to be deposited, levies and collects certain of the more important state taxes, inquires periodically into the court and trust funds deposited with county treasurers, appoints examiners and prescribes the forms of reports under the municipal accounting laws, and at the same time acts as *ex officio* member of certain boards and commissions.

(5) It is the duty of the attorney-general to prosecute and defend all actions and proceedings in which the state has an interest, to advise the governor and other state officers on legal questions,[1] to take charge of the legal business of the departments and bureaus of the state requiring the services of counsel in order to protect public interests. In New York, the attorney-general has certain specific duties in addition to the general supervision of the state's legal interests: when required by the governor, either he or one of his deputies must appear before any supreme court or the grand jury thereof for the purpose of conducting such criminal proceedings as the governor may specify; upon the request of the governor, secretary of state, treasurer, or state engineer and surveyor, the attorney-general must prosecute

[1] For an example, see *Readings*, p. 452.

any person charged with the violation of the laws which either of these officers is especially required to execute; and he must cause all persons indicted for corrupting, or attempting to corrupt, any member of the legislature, to be brought to trial.

II. The second group of state officers embraces such a variety of public functionaries that they can hardly be enumerated here. As the burdens of our commonwealth governments have increased with the growth of the population, industries, cities, and corporations, the legislatures have created new offices, boards, and commissions charged with carrying into effect regulations dealing with specific matters. These may be classified in four divisions: (1) those supplementary to the older departments, such as excise, tax, and civil service commissions; (2) those in charge of public property and public works; (3) those connected with the social activities — education, charities, and health; and (4) those dealing with economic questions relative to insurance, banking, corporations, and labor. These new state offices have been created one after the other as new demands have been made upon the legislature; and as the federal policy of classifying and subdividing into departmental hierarchies has not been adopted by our commonwealths, the result has been the creation of a system which is the very apotheosis of chaos and irresponsibility.

In New York, for example, there was in 1910 a state engineer, a superintendent of insurance, a superintendent of banks, a commissioner of excise, a superintendent of public works, a commissioner of education, a commissioner of agriculture, a forest, fish, and game commissioner, a commissioner of health, a state civil service commission of three members, a prison commission of seven members, a superintendent of prisons, a superintendent of public buildings, a state architect, a tax commission of three members, a commissioner of labor, a lunacy commission of three members, a board of charities, managers for a large variety of charitable and reformatory institutions, a fiscal supervisor of state charities, a water supply commission, a land office commission, a canal board, a commission for the canal fund, a state board of canvassers, an equalization board, a classification board controlling wages of labor for state employments, a state historian, a miscellaneous reporter, a quarantine commission, a superintendent of weights and measures, a commission for the promotion of uniform legislation in the United States, an agent

for the Indian tribes, a voting machine commission, a board of pharmacy, an embalming board, a state fair commission, a statutory consolidation board, a highway commission, and two public service commissions — to say nothing of some other minor independent commissions and offices.

In examining the multitude of state administrative instrumentalities one is struck by the tendency of the legislatures to vest specialized functions in the hands of elected or appointed boards or commissions. Some of these commissions are merely temporary — that is, designed to investigate certain conditions and problems for the purpose of reporting to the legislature.[1] Other commissions and boards have semi-judicial powers; but most of them are charged primarily with what may be properly called executive functions.

Two reasons may be advanced for this tendency to multiply boards and commissions. In the first place, it is often impossible for the legislature to prescribe fixed conditions under which private persons and corporations must conduct their affairs; for example, there is certainly an obvious injustice in prescribing a flat passenger rate of two cents a mile throughout the state, for such a rate may be entirely just for some companies and confiscatory for others, according to the distribution of passenger business, the mileage operated, etc. Therefore our legislators, compelled to face detailed and complicated problems of administration, seek to escape from the dilemma by delegating certain of their powers to commissions and authorizing them to make and enforce minute and specific regulations.

In the second place, the creation of commissions is an easy way of evading or postponing the actual solution of a legislative problem.[2]

Government through such state commissions has been severely attacked in recent years. It is pointed out that when a commission is once created, it begins a heroic fight for an increase in its powers and in its annual appropriations. It is claimed also that politicians without experience in practical business affairs are often placed on boards having control of great railway and other corporations, the intricacies of whose operations can be understood only by the most highly trained administrative

[1] For the work of such a commission, see *Readings*, p. 471.

[2] *Readings*, p. 453.

officials; and as a result the reasonable operations of these private companies are seriously hampered without any corresponding good accruing to the public. An informed writer has declared: "The present-day methods of administration through commissions are neither economical, efficient, nor responsible. On the contrary, from the evidence before us they seem to be the most extravagant methods, having a great lack of efficiency and being responsible to no one. Their creation, too, has taken a part of the executive power from where it logically belongs and transferred it to them in a manner which greatly weakens executive power and authority, while it does not inure to the benefit of the people."[1]

To this criticism of commission government, the defenders of the system reply that we cannot allow the great corporations to go unregulated as they have been in the past, and the legislatures simply cannot control the details of great private undertakings. Accordingly, they conclude, a commission of experts with large powers to prescribe rules for particular matters is the only institution through which the state may regulate corporate enterprises, unless it is prepared to assume direct ownership and operation.

The bewildering list of commissions, boards, and departments which we find in every important state is simply appalling when we take into account the necessity, in public administration, of providing for efficient work and of fixing definite responsibility. These boards and officers are frequently lobbying against one another in the legislature for appropriations and an increase of powers. Some of them are elected by popular vote; and others are appointed by the governor, with or without the approval of some branch of the legislature. Their terms vary so that the appointing power never has an opportunity to make a clean sweep and introduce more efficient administrative methods. Some of these subordinate authorities may be removed by the governor alone and others by the governor and the senate, and still others by the very difficult process of impeachment.[2] Any one who has followed the somewhat uninteresting history of state administration during the last quarter of a century

[1] L. A. Blue, in the Annals of the American Academy of Social and Political Science, Vol. XVIII, pp. 434 ff.

[2] See below, p. 509.

is well aware of the wastefulness and inefficiency resulting from this disintegrated and irresponsible system.

The situation is thus eloquently described in a plea, made by a committee of citizens in Oregon.[1] "There are forty-seven boards and commissions created to enforce the laws and manage the business of the state of Oregon," says the committee. "In addition to these we have the governor, secretary of state, state treasurer, superintendent of instruction, state printer, attorney-general, commissioner of labor, thirty-four sheriffs, unknown numbers of deputies, police, and constables, eleven district attorneys, and thirty-seven deputies. Every one is in a great degree independent of all others and of everybody else. There is no one officer who is responsible to the people of the state for the enforcement of state laws and the efficient management of the state business. The constitution says 'the governor shall take care that the laws of the state be faithfully executed,' but gives him no power beyond that of making recommendations. No successful private business is conducted so carelessly as American public business, and it is generally admitted that the state and county governments are seldom successful either in enforcing the laws or giving the taxpayers good value for their money."

As a remedy for this disorder in the body politic, the committee proposes that the governor shall appoint the attorney-general, the secretary of state, state treasurer, state printer, superintendent of public instruction, secretary of labor, and the state business manager;[2] and that these officers shall serve during the governor's pleasure under his immediate direction and act as his advisory cabinet. The committee furthermore proposes that the governor shall appoint the sheriff and district attorney in each county. The new state officer, the state business manager, is to organize, consolidate, and manage the business affairs of the state, subject to the governor's directions; and the governor is to take over the control of all state institutions and public functions in the hands of boards and commissions, retaining only such as he deems expedient and economical — thus assuming before the people *absolute* responsibility for the

[1] *Suggested Amendments to the Constitution of Oregon*, W. S. U'Ren, Oregon City, Oregon, August 14, 1909.

[2] Governor Hughes in his message of 1910 recommended a similar reform.

efficient conduct of the entire business of the state. If this proposal is enacted into law, it will institute in the state of Oregon a political system founded in part upon the principles of the national administration. It could hardly be said, therefore, that it would constitute a new experiment in American politics, but it certainly would be watched with great interest by all other commonwealths.

A second method of centralizing state administration and responsibility is suggested by Mr. Herbert Croly, who urges that American citizens have no particular reason for being proud of their state governments because those governments have not, in actual practice, shown themselves capable of undertaking successfully, economically, and efficiently those large public enterprises required by the social and economic advance of our time.[1]

This critic, accordingly, suggests a reconstruction of our commonwealth governments somewhat along the following lines. The centre of the new system would be a governor, elected for a long term, but liable to recall by the voters under certain definite restrictions. The governor would be surrounded by a cabinet composed of the heads of departments appointed by himself;[2] he would have the power of removing every important administrative officer in the state and would hold his departmental chiefs strictly responsible to him for the administration of their several departments. Departmental chiefs would be able to appoint their more important subordinates, but the technical work of the administration would be in the hands of experts chosen under a carefully planned civil service system. The legislature, under this scheme of government, would consist of a single chamber composed of delegates elected from districts by some system of cumulative voting which would give minority representation and at the same time provide for recall by the voters. Under this proposal, American traditions as to the separation of executive and legislative power would be entirely abandoned; and the governor would be given not only the veto, but also the right to propose legislation and dissolve the legis-

[1] *The Promise of American Life*, pp. 315 ff.

[2] In some New England states the governor now has an advisory council, but it is of slight importance; and in North Carolina certain state officers aer constituted a "Council of State."

lature and appeal to the people in case his particular measures were rejected or seriously amended. Critics of this scheme will probably regard it as un-American and fanciful; but in view of the recent tendencies in municipal government toward some such system, it may not be unreasonable to expect, in the distant future at all events, a modification of the entire structure of state government along lines of greater centralization of responsibility, greater simplicity of structure, and more constant control in the hands of the voters.

A third and more immediately practical method of meeting the problems arising from the disintegration and confusion existing in our state administration systems has been proposed by another writer.[1] To concentrate responsibility, to prevent commissions and boards from competing with one another for legislative appropriations, to produce that economy which comes from large operations in the purchase and distribution of supplies, and to bring together those branches of administration which are technically related, the various state administrative offices may be grouped into the following executive departments, each under the head of a responsible officer appointed by the governor or elected by the legislature or chosen by popular vote — preferably appointed by the governor: —

Department of state.
Department of finance, including the functions of treasurer and comptroller.
Department of justice.
Department of education, supervising public schools, colleges, libraries, and normal schools.
Department of commerce and labor, including factory inspection, collection of labor statistics, arbitration and conciliation, supervision of manufactures, etc.
Department of corporate control: over railway, gas, telephone, street car, banking, and insurance corporations.
Department of agriculture, having charge of the agricultural interests and fish and game supervision.
Department of public works, supervising highways, parks, sewerage, buildings, public lands, forests, etc.
Department of charities and corrections, with general super-

[1] Mr. White, in *The Political Science Quarterly*, Vol. XVIII, p. 655.

vision over all institutions and laws affecting defectives, delinquents, and dependents.

Department of public safety, with control over health and police authorities.

The practical movement for reorganizing and consolidating state administration began in 1909 when the People's Power League in Oregon proposed a plan which was designed to centralize authority in the governor.[1] Comprehensive plans along similar lines were prepared by expert commissions in Iowa in 1913 and in Minnesota in 1914. In 1915 the New York Bureau of Municipal Research prepared for the constitutional convention a complete survey of the state government and suggested a scheme of reorganization and consolidation.[2] The constitution which was prepared went far in the direction of centralization, but it was rejected by the voters.

Two years later, Illinois adopted a comprehensive program of reorganization based upon a careful survey of the institutions and agencies of the state by a staff organized under the direction of Professor John A. Fairlie. As Illinois, under the leadership of Governor Lowden, led the way in this important reform, it is fitting that the program of that state should receive fuller treatment. The reorganization was brought about by act of the legislature and therefore did not affect the elective officers of the state who stood on the same footing as the governor. The new code however abolished more than one hundred statutory offices, boards, departments, and agencies, and consolidated their functions under nine departments as follows:

1. Finance, charged among other things with the responsibility of preparing the budget for the governor's scrutiny.

2. Agriculture, including all agricultural and related activities as well as food inspection.

3. Labor, including an industrial commission in charge of arbitration and conciliation matters.

[1] This statement is based on an admirable summary by Mr. A. E. Buck, National Municipal Review for November, 1919. The great report by "The Efficiency and Economy Committee" of Illinois, under date of 1915, is a mine of information and wise comment on state administration. Of special importance also is the scientific study of the subject by Mr. J. M. Mathews, *Principles of American State Administration*, the first treatise of the kind to break away from the purely legalistic method of handling the question.

[2] Municipal Research, Nos. 61, 62, and 63.

4. Mines and Minerals.
5. Public Works and Buildings.
6. Public Welfare, having jurisdiction over all charitable, penal, and reformatory institutions.
7. Public Health, including control over laboratories.
8. Trade and Commerce, embracing the regulation of utilities.
9. Registration and Education.

Each department is headed by a single director appointed by the governor with the approval of the senate. In all cases in which departments are called upon to exercise quasi-legislative or quasi-judicial functions boards were provided. These include an industrial commission, a mining board, a tax commission, a miner's examining board, a public utilities commission, a normal school board, and a food standards commission. Each board is a part of the department to which it belongs and is under the system of financial control to which other officers are subjected. In several cases advisory boards were instituted to serve as counsellors to department heads and the governor. They do not have however any power over actual administration. The responsibility for action rests squarely on the department chiefs.

A consolidation along similar lines took place in Idaho under the leadership of Governor Davis, in 1919. The act abolished some forty-six offices, boards, and other agencies and set up nine departments. In 1919, Nebraska, also at the instance of the governor, Mr. McKelvie, reorganized nearly all of the statutory agencies of state administration into six main departments. Following the adoption of a constitutional amendment on November 5, 1918, limiting the state departments to twenty, the Massachusetts legislature passed a consolidation act which became effective on December 1, 1919. This measure was not, however, drastic, like the Illinois law of 1917. On the contrary it merely grouped most of the old agencies under new heads, leaving the administrative system (as far as personnel and duties of officers were concerned) almost as it stood before.

The Removal Power in State Administration

The governor has no general power of removal like that enjoyed by the President of the United States. Not only do we discover a great variety of practices among the several common-

wealths, but in each state we find different methods of removal applied to officers of equal rank as well as officers of different grades. In almost any commonwealth one may find three or more methods of removal.

The first method is that of impeachment. Many state constitutions provide that any civil officer of the state may be impeached; others make all executive officers liable to impeachment; and still others especially enumerate the officers who may be impeached. The causes of impeachment vary, but crime, misdemeanor, treason, bribery, drunkenness, malfeasance, gross immorality, extortion, neglect of duty, incompetency, and misconduct are among those enumerated in various constitutions. South Carolina, however, assigns no causes for impeachment whatever, but leaves the matter to the legislature.

The process of impeachment, in general, follows that prescribed by the Constitution of the United States: the lower house of the state legislature initiates the proceedings, and the senate acts as a court of trial, sometimes in conjunction with one or more justices of the state supreme court — for example, in New York the judges of the highest court of the state (the court of appeals) are associated with the senate in trying cases of impeachment. Nebraska has a somewhat curious method of impeachment by a joint session of the legislature and trial by the judges of the supreme court. "The senate and house of representatives in joint convention," runs the Nebraska constitution, "shall have the sole power of impeachment, but a majority of the members must concur therein. Upon the entertainment of a resolution to impeach by either house the other house shall at once be notified thereof and the two houses shall meet in joint convention for the purpose of acting upon such resolution within three days of such notification. A notice of an impeachment of any officer other than a justice of the supreme court shall be forthwith served upon the chief justice by the secretary of the senate, who shall thereupon call a session of the supreme court to meet at the capital within ten days after such notice to try the impeachment."

The effect of an impeachment is generally to remove the offender from office and to disqualify him from holding any state office; but any person impeached, whether convicted or

not, is liable to trial and punishment for his offence in the ordinary courts of law.

A second method of removal is by a resolution of the state legislature. This method is often provided for the removal of judges and judicial officers. For example, in New York, judges of the court of appeals (the highest court of the state), and justices of the supreme court may be removed by concurrent resolution of both houses of the legislature, two-thirds of all the members elected to each house concurring therein; and all other judicial officers, excepting certain minor officers, may be removed by the senate on the recommendation of the governor, two-thirds of the members of the senate concurring in the action; but in all cases an opportunity to be heard must be afforded the defendant.

The third method of removal is by the governor and the senate. This is the common practice in New York, where nearly all the chief state officers and members of commissions are appointed by the governor and the senate and removable by their joint action.

The fourth method of removal is by the governor alone; but this power is not very extensively granted by our state constitutions. In several states — for example, Colorado, Maryland, Illinois, Nebraska, and Pennsylvania — he may remove those officers whom he appoints. "The governor shall nominate," runs the Colorado constitution, "and by and with the consent of the senate appoint all officers whose offices are established by this constitution or which may be created by law and whose appointment or election is not otherwise provided for, and may remove any such officer for incompetency, neglect of duty, or malfeasance in office." In New York, the governor may suspend the state treasurer during a recess of the legislature; he may also remove the superintendents of public works and of prisons, members of the public service commission, and some local officers, including district attorneys, county treasurers, sheriffs, mayors, etc.

The fifth method of removal is by the courts. In a few instances the judges of the higher courts may remove prosecuting attorneys, minor judicial officers, and minor county and town officers. For example, the constitution of Oregon provides that, "public officers shall not be impeached; but incompetency, corruption, malfeasance, or delinquency in office may be tried

in the same manner as criminal offences and judgment may be given of dismissal from office and such further punishment as may have been prescribed by law." [1]

A sixth method — recall on petition of 25 per cent. of the voters — was authorized by a constitutional amendment adopted in Oregon in 1908.[2]

The State Civil Service

Very early in our history, state offices, like the offices at Washington, fell under the sway of the spoils system. It became the common practice for any party, on defeating its rival, to oust from the state offices even all the employees whose duties were purely clerical. An official investigation in New York into the methods prevailing during the early eighties led to the conclusion that political considerations controlled almost exclusively all appointments; that the partisan service of the appointee, either past or expectant, was the reason for his appointment; that the public welfare was only a nominal factor in selecting employees; that the most meritorious persons were deterred from entering public service; that the character of the service was lowered by the patronage system; that the public officers having the power to make appointments were burdened and embarrassed by the pressure upon them for spoils; and that officers imperilled their positions by showing any independence.

New York led the way in civil service reform by passing, in 1883, a civil service law providing for a commission authorized to coöperate with the governor in preparing rules, classifying the state civil service, and conducting the examinations for the positions to be filled by competition. Other states were slow to follow the example of New York, even in a tentative way. In 1920 the civil service reformers were able to report only ten commonwealths with state civil service commissions, namely, California, Colorado, Connecticut, Illinois, Kansas, Massachusetts, New Jersey, New York, Ohio, and Wisconsin. The greatest gains were made in cities where the functions of government are more technical in character, and the dangers of reliance upon mere political appointees more obvious.

[1] The constitutions of many states vest in the legislatures the power of providing the methods by which inferior officers may be removed.

[2] See above, p. 472.

State political organizations cling with great tenacity to the spoils of office as rewards for political services. Even technical work of the highest order such as highway engineering, or the management of state institutions, in an overwhelming majority of the states, is subjected to political necessities. Politicians do not even hesitate to put in jeopardy the lives and comfort of the unfortunate wards of the state by intrusting their control to men whose sole claim to consideration is "party regularity."

In the few states having the merit system, the civil service laws follow, in general, the national law. They provide for the division of public offices into two groups: the classified and the unclassified. The unclassified service includes all offices filled by election or by the legislature or by the governor and senate, and certain other specified offices. The classified service comprises all other positions, which are subdivided into three groups: the competitive, the non-competitive, and the exempt. The competitive group includes such officers as clerks, copyists, stenographers, cashiers, and civil engineers. The offices in this group are filled by examinations or promotions and transfers.

The civil service laws require all examinations to be practical in their character and to relate to such matters as will fairly test the relative capacity and fitness of persons examined to discharge the duties of the service which they seek to enter. For the various places requiring technical skill, — such as the positions of factory inspector, health officer, civil engineer, chemist, and expert accountants, — special examinations in the respective branches are given; and in no case is reliance placed solely on book knowledge. The persons who are successful in the examinations are grouped according to the services which they seek to enter and arranged in the order of their respective grades. Whenever a vacancy occurs, the appointing officer must choose from the three names highest on the roll of candidates.

The non-competitive class includes those minor employees whom it is impracticable to include in the competitive class, such as bakers, carpenters, stone-cutters, and picture-framers. Appointments to the non-competitive class are made after non-competitive examinations conducted according to rules.

In the exempt class are the deputies of the principal executive officers, the chief clerks, and skilled and unskilled laborers not included in the other classes.

The civil service laws, as a rule, provide, furthermore, that removal must not be made for political reasons, but only for incompetence or insubordination. In case of removal, the employee affected usually has the right to be heard in his own behalf.

In the state of New York, the administration of the civil service law is in the hands of a state commission composed of three members, not more than two of whom may be adherents to the same political party, appointed by the governor and the senate. In conjunction with the governor, this commission has devised rules governing the civil service and planned examinations for the different branches of the service. It is the duty of the commission to prescribe and enforce rules for carrying the civil service act into effect, to keep records of its proceedings, make investigations, and report on the state of the civil service and the conduct of officials under the law, and to compel the attendance of witnesses whenever required for an investigation.

In spite of the desirability of getting rid of the partisan control in filling public offices, there is no doubt that there are some grave objections to the present civil service methods. As Governor Black of New York pointed out, in his message of 1897, experience, character, tact, and even muscle may be of more importance in some cases than a fraction of a per cent in an examination in geography, and, therefore, the discretion of the appointing power should not be entirely subordinated to the merit system. An attempt, however, to carry this idea into effect by a law providing that no more than fifty per cent should be given to merit, and that the remainder of the rate (representing "fitness") should be given by the appointing officer or some persons designated by him — that is, an attempt to make room for "experience, character, tact, and even muscle" — led to a disorganization of the civil service and the introduction of the old partisan methods; and it was shortly abandoned on the urgent recommendation of Governor Roosevelt. It is agreed that no merit system is perfect, but its critics are invited to consider a choice between civil service reform with all of its limitations and the spoils system with its long train of undoubted evils.

Newer Tendencies in Civil Service Reform

About 1910, civil service reform entered into a new and interesting phase. During the early years of the movement attention had of necessity been directed mainly to devices for

keeping the politicians out of the public offices and for preventing the prostitution of public service to mere partisan ends. As time went on the insufficiency of a somewhat negative program became increasingly apparent. The merit system itself was found to be everywhere accompanied by a number of evils, such as: (1) irregularity of pay for the same classes of work, (2) multiplication of fictitious and useless titles, (3) legislative increases in the pay of individuals for party reasons, (4) lack of opportunities of promotion for those entering the lower ranges of the public service.

The first attack on these evils took the form of what was known as "the standardization of salaries and grades." It was made in Chicago in the form of the reclassification work undertaken in 1905. Studies of a similar character were later carried on in other places: New York City in 1910, Pittsburgh in 1914, New York State in 1915, and in large divisions of the federal service in 1919–20 (the Jones-Keating joint commission on the reclassification of salaries and grades).[1] About the same time large industrial corporations began to give attention to the perplexing problems of employment administration, and in 1916 the first annual conference of employment managers met in Minneapolis. "Personnel problems" were suddenly found to be the heart of "scientific management" and the personnel problems of the government were found to be in many particulars like those of great private corporations.

It is impossible to trace here the barest outline of the history of this new movement, to evaluate its results, or to estimate its potentialities. In brief, the objects of those working at the various phases of the subject may be summarized as follows:

1. To furnish a simple and logical classification of all employments in the government service on the basis of duties actually performed by incumbents.

2. To fix positively the duties, title, and rates of compensation attached to each position.

3. To establish the standard factors of experience, ability, and training required in each position for efficient performance and therefore essential to admission to the service in that particular line.

4. To establish the standard factors of service, training, and

[1] For a partial review see Municipal Research, Nos. 67 and 76.

ability necessary to promotion in any line, thus fixing the conditions which must be met by those desiring to make progress in the service.

5. To develop educational agencies to train for admission to the public service and for promotion in the service.

6. To establish model conditions of employment as regards hours, sanitation, sick and death benefits, etc.

7. To draw organizations of employees into coöperative relationship with the civil service commission or other agency having responsibility for personnel matters.

8. To develop methods of informing as many people as possible of the vacancies and opportunities in the public service, thus raising the level of competition for positions.

9. To help educate the public to a just appreciation of the necessity for trained and expert service in every branch of the administration.

It is evident that this is an ambitious program. It is at present realized in only a small part and it is being enlarged as more and more trained minds are giving attention to the issues which it involves. The British government has already gone a long way toward drawing associations of employees into close and effective relations with administrative officers, by applying a modified plan of labor councils to the civil service. The purposes of this reform were declared to be an increase in the efficiency of the public service, to provide machinery for adjusting grievances, to bring to the administration the views and suggestions of those employed, and generally to obtain the utmost possible harmony between the managing side of the business and those who work at the business.[1]

[1] See Good Government (published by the National Civil Service Reform League) for September and October, 1919. For a review of the constitutionality of merit system legislation, see an article by B. A. Arneson in the American Political Science Review, November, 1919.

CHAPTER XXV

THE STATE LEGISLATURE

THE legislature should occupy a high position in the esteem of the citizens of a commonwealth, for in it are made the laws which most vitally affect their lives and property. Unlike the Congress of the United States, the state legislature is not restricted to the exercise of certain powers, but enjoys every right and authority which is not expressly denied to it by the Constitution of the United States or the constitution under which it is erected. It has control over the whole domain of civil law; that is, it lays down the rules governing contracts, real and personal property, inheritance, corporations, mortgages, marriage and divorce, and other civil matters. It defines crime; that is, it prescribes those actions of the citizen which are to be punished by fine or imprisonment or death. It touches the property of the citizen not only by regulating its use, but also by imposing upon it a burden of taxation. Finally, it has control over that vast domain known as the police power, under which it makes regulations concerning public health, morals, and welfare, devises rules for the conduct of business and professions, and in other ways restrains the liberty of the citizen to do as he pleases.

When one looks at this vast range of power and then turns to the history of the state legislatures, he is astounded at the decline in public esteem which they have suffered within recent years. They have too often been corrupt, negligent, and wasteful. They have in many instances made laws for the benefit of private persons and corporations and bartered away charters and franchises; and they have even gone so far in some states as to repudiate portions of the public debt. These charges are not based upon mere hearsay evidence. The discreditable record of many of our state legislatures is written in the constitutions of the states, and described more fully in the debates of the

conventions which framed those constitutions. In fact, the legislative history of the nineteenth century is the history of a steady reduction in the power of the legislature. Convention after convention has exhausted its ingenuity in devising new restrictions on its power for evil. For example, the constitutional conventions of Pennsylvania held in 1837 and in 1873 were, to a considerable extent, devoted to the task of providing some way to prevent a renewal of the corrupt actions on the part of the legislature which had discredited that body with the people of the commonwealth.[1] Likewise the constitutional convention of Kentucky, held in 1890, gave serious attention to discovering methods for checkmating the legislature. "It is a well-known fact," said Mr. Carroll, during the debates in that convention, "that one of the prime causes for calling this convention was the abuses practised by the legislative body of this state; and I venture the assertion that, except for the vicious legislation and the local and special laws of all kinds and character passed by the legislatures that have met in Kentucky for the past twenty years, no proposition to call a constitutional convention could ever have received a majority of the votes of the people of Kentucky." [2]

On comparing our present state constitutions with the constitutions of the eighteenth century, we find this feeling of distrust recorded in numerous precise restrictions on the exercise of the legislative power. As we have seen, the governor has been given the veto, primarily for the purpose of preventing misappropriation of funds, and hasty and corrupt legislation. To reduce still further the power of the legislatures for evil, some constitutions have restricted their sessions to fifty or sixty days; and the old practice of annual sessions has been almost entirely abandoned. Special and local laws, once the chief source of log-rolling and corrupt bargaining, have been forbidden except under stringent safeguards. Furthermore, a large number of legislative matters relating to education, taxation, and corporations have been treated in several state constitutions so that they have grown in bulk and look very much like statute books. This has been largely due to the belief on the part of the constitution-makers that the legislatures could not be trusted

[1] *Readings*, p. 84. [2] *Ibid.*, p. 445.

to do their duty. Even the procedure in the legislative houses is, in part, prescribed in the constitution for the purpose of securing regularity and publicity in the passage of statutes. A great number of states, as we have seen, have gone so far as to establish a complete system of initiative and referendum, thus taking the ultimate legislative power entirely out of the hands of the legislature.

This experience has had a most unhappy effect upon the attitude of the people toward their representatives. It has caused many advocates of honest and efficient government to turn to the executive of the state rather than to the law-making body; and it has brought the citizens to look with more or less contempt upon their representatives in the legislature. Indeed, this attitude of criticism and ill-will has gone entirely too far. Too much stress has been laid upon the sensational exposures which have in so many instances discredited the representative branch of our state government. As Professor Reinsch has pointed out, the most superficial acquaintance with our legislatures will "reveal the fact that they are fairly representative of the American people and that there is in them a great deal of honest effort to grapple with the difficult problems of legislation, misguided though this effort may be at times, for lack of authentic information, and thwarted by certain vicious arrangements in our political systems."[1]

The Structure of the Legislature

The general term applied to the representative branch of the state government is "the state legislature"; but the technical name for that body varies from state to state. In about one-half of the commonwealths it is known as "the general assembly"; in a few states as the "legislative assembly"; and in New Hampshire and Massachusetts as "the general court." All of the states call the upper house of the legislature the senate; and in most of them the lower house is known as the house of representatives, though in some states, including New York, it bears the name of the assembly, and in a few others that of the house of delegates.

In determining the number of members of the legislature, our constitution-makers have arrived at no concensus of opinion.

[1] Reinsch, *American Legislatures*, p. 128.

Massachusetts, with a population of 2,805,346 inhabitants (1900), has 40 members in the upper house and 240 in the lower house; New York, — the most populous state in the Union, — containing, in 1900, 7,268,894 inhabitants, has 51 senators and 150 assemblymen. According to Professor Dealey, twenty-one states, varying in population from one to three millions, have, on the average, 40 senators and 115 representatives each. In a word, there is little or no positive effort to establish an exact relation between the number of representatives and the population; but experience has shown that it is wise to have the number prescribed by the constitution of the state in order to prevent the legislature from increasing its own size for political purposes.

All of our state legislatures are divided into two houses. Theoretically speaking, there is no obvious reason why there should be an upper house in the state legislature. The House of Lords in England, the upper house in Switzerland, and the Senate of the United States are to be accounted for by the fact that some provision was made for the representation of certain interests which could not be merged with those reflected in the lower chamber.[1] The members of the upper house of the American state legislature are chosen by popular vote; they do not, like the House of Lords, represent the landed interests and the clergy; neither do they represent any large and important subdivisions as do the members of the Swiss Council of states and the United States Senate. Many provinces in Canada have single-chambered legislatures, but the constitution-makers in the United States have believed it necessary to provide a second chamber to check hasty and ill-considered measures and to secure a more careful consideration of the laws. How far the original purpose has been realized is open to question.

Our state senates differ from our lower houses in the following particulars: the senatorial districts are always larger than the districts of the lower house — often the senatorial district embraces three assembly districts; the senator is usually chosen for a longer term than the representative — in New York for two years, while the assemblyman enjoys a term of only one year; and it is a frequent practice also to have the state senate, like

[1] In the beginning of our history, however, the larger property interests were especially represented in the state senate. See above, p. 81.

the Senate at Washington, a continuous body by requiring only partial renewals periodically.[1]

According to the modern democratic theory of equality, the representatives in the state legislatures should be apportioned among districts containing substantially an equal number of inhabitants. Several of our state constitutions prescribe that representation shall be so distributed, and that after each census there shall be a reapportionment in order to correct the discrepancies caused by changes in the population.[2] This principle has been recognized by about one-third of our states scattered throughout the Union, including commonwealths as far apart as Massachusetts and California, Washington and Tennessee.

About one-third of the states provide for general distribution of representation on the basis of population, with certain minor concessions to local divisions. Alabama, for example, provides that each county shall have at least one member in the house, regardless of the number of its inhabitants. In Florida, there must be at least one and not more than three members from each county in the house, and under this provision, in 1905, four of the most populous counties had only twelve members, whereas on a strict population basis they would have been entitled to eighteen. The constitution of New York likewise recognizes the county as the unit of representation by providing that each one, except Hamilton, shall have at least one member in the assembly — the lower house; and, as Professor Dealey points out, this requirement plays havoc with popular representation, for about one-fifth of the districts fall far below the ratio established by dividing the total population of the state by 150 — the membership of the lower house. Not only are the smaller counties over-represented; the more populous counties are under-represented.

Another exception to the democratic theory of equal election districts is the discrimination made in most of our state constitutions against the cities in favor of the rural districts. In the state of New York, for instance, it is provided that no county, no matter how populous, shall have more than one-third of all the senators, and that no two counties, adjoining or separated

[1] Bryce, *The American Commonwealth* (1909), Vol. I, p. 482.

[2] Indiana apportions representation on a basis of the number of males over twenty-one years.

only by public waters, shall have more than one-half of all the senators.

In several of our states this discrimination against the cities and in favor of units of local government has led to abuses in representation almost as glaring as those which existed in England prior to the reform bill of 1832. Connecticut, for example, distributes the members of the lower house among towns and cities, giving one or two members to each.[1] This system works a gross inequality: thirty-four of the most populous towns and cities have sixty-eight members in the lower house, whereas if the distribution were made on the basis of population they would be entitled to 186 members. Again, four of the smallest Connecticut towns, with a total population of 1567, have five members; four of the most populous cities, containing 309,982 inhabitants, have only eight members, whereas on the basis of population they would be entitled to eighty-seven. These inequalities are only partially atoned for by the fact that membership in the senate is distributed on the basis of population.

In Vermont also we find remarkable instances of "rotten boroughs."[2] By the constitution of that state, which cannot be amended without the concurrence of two successive legislatures, each town is entitled to one and only one representative in the lower branch of the legislature. Ten towns with 1231 inhabitants — 3.6 per cent of the total population — have equal representation with ten others whose population is 93,936 — 27.3 per cent of the whole. Towns having one-half the total population elect only 15.8 per cent of the representatives. Three towns have three times the representation of one city which has one hundred times their combined population. On the basis of representation in the smallest town, the largest city would choose 388 members, or 142 more than the entire house.[3]

[1] Dealey, *Our State Constitutions* (1907), p. 80.

[2] Rhode Island was long famous also for its "rotten boroughs," but an amendment adopted in 1909 provides for reforms.

[3] These figures are based on the census of 1910, but the proportions have not been seriously altered by changes in the population since that time. It will be noted that the general plan of government set up by the Vermont constitution of 1793 (except as to the single-chamber legislature) has not been radically altered by the amendments since adopted. When that venerable instrument was drafted the population of the state was evenly scattered among the rural towns and there was no untruth in the state-

Strange to say, these violations of the democratic principle of equality in representation do not seem to incur any serious opposition on the part of the people — probably owing to the tenacity with which the rural districts cling to their special privileges and also to the general indifference shown to constitutional questions by the electorates of the great urban centres.

On account of the general practice of "gerrymandering," it has become the custom to fix in the state constitution some general principles controlling the distribution of representatives. This custom may be illustrated by the New York constitution, which fixes the number of the senate and the assembly, provides for a reapportionment every ten years, and prescribes that the senate districts shall be as nearly equal as possible, compact in form, and consisting of contiguous territory. It further stipulates that in making senate districts no county can be divided, except to make two or more senate districts wholly within such county; and lays down the limitation, mentioned above, discriminating against the most populous counties. It prescribes that each county, with one exception, shall have at least one member in the assembly, and places the apportionment of assemblymen in counties entitled to two or more members in the hands of the board of supervisors, or the common council.[1] It also provides that each assembly district must be wholly within a senate district, and that under no consideration may a township or city block be divided. To give the citizen a remedy against gerrymandering, the constitution explicitly states that a legislative apportionment law is subject to review by the court of appeals at the suit of any citizen.

Only a few states in the Union have departed from the ancient practice of electing members of the legislature by single districts. In Illinois, a system of minority representation has been in force since the adoption of the constitution of 1870. The law provides that the house of representatives shall consist of

ment that the plan of government was devised so "that the freemen of this state might enjoy the benefit of election as equally as may be." Connecticut did make a concession to changing conditions by providing in 1876 that no new town thereafter incorporated should be entitled to a representative in the General Assembly unless it had at least twenty-five hundred inhabitants. Vermont apparently found no reason for such a radical departure from the established rule.

[1] In each city embracing an entire county.

three times the number of the members of the senate; that three representatives shall be elected in each senatorial district at the regular biennial election; and that in the election of representatives each qualified voter may cast as many votes for one candidate as there are representatives to be elected, or may distribute his votes or equal parts thereof among the several candidates as he sees fit. The three candidates standing highest on the list after the votes are counted are declared to be elected.

Mr. B. F. Moore has made a careful study of the working of this system of minority representation and has arrived at certain important conclusions.[1] He shows that in actual practice the system almost always secures a minority party representative in every district, although it by no means works out proportionately for all of the smaller parties. He demonstrates that the system, furthermore, does away with many of the evils and gross inequalities of the gerrymander. He cites, for example, that, in 1894, 21,783 votes were required for each Democratic member elected to the lower house of the legislature of New York while each Republican member had only 6341 votes to his credit — that is, taking averages. He also shows that in Michigan in the same year the Republicans with a vote of 237,215 elected 99 members to the lower house of the legislature, while the Democrats with 130,823 votes secured but one representative. He then turns to Illinois. It required 9089 Republican or 35,889 Democratic votes to elect a state senator in 1906, while under the cumulative system applied to the lower house the averages for the same year were substantially equal, each Republican representative averaging 12,970 votes and each Democratic representative 14,268 votes. His general conclusion is that "while the house vote shows some variation and can scarcely be regarded as ideal, nevertheless it has none of those glaring inequalities so frequently prevalent as the result of the inherent injustice of the majority system combined with the consummation of political art in juggling district boundary lines."

On other questions Mr. Moore was unable to come to such precise conclusions. With regard to whether cumulative voting

[1] B. F. Moore, *The History of Cumulative Voting and Minority Representation in Illinois*, University of Illinois Studies, 1909.

increases or diminishes the power of party organization, a variety of conflicting opinions was found among men of broad political experience. A number maintained that the system had no effect whatever on party organization, but a still larger number contended that the influence of the party machine had been decidedly increased owing to the necessity of controlling the distribution of the three votes placed in the hands of each voter.

With regard to the still more important question of the influence of the cumulative system on the legislative personnel, Mr. Moore found almost insuperable obstacles in the way of securing convincing conclusions. On this point one member of the Illinois legislature said, "I would say in general that they are probably more representative men;" while another member of the legislature declared, "The worst candidate stands the best chance of election, as appreciating the fact that he is weak, the 'plumping' is oftentimes overdone to even up the vote." After all, concludes Mr. Moore: "The strongest recommendation for the cumulative system is the fact that at all times it secures representation for a minor party, thus insuring a strong minority in the lower house. An ever present minority also serves to check the tendency to corruption which almost invariably follows when one party has for a considerable time a large majority in the legislature."[1]

With regard to the term[2] enjoyed by members of state legislatures there is a general tendency to increase the length. More than one-half of the states elect senators for a period of four years; about one-third fix the term at two years; while Massachusetts and Rhode Island alone retain the old practice of annual elections. In all but a few states the term of the members of the lower house is placed at two years; Alabama, Louisiana, and Mississippi have fixed the term at four years, while Massachusetts, New York, New Jersey, and Rhode Island retain the old custom of annual elections.

[1] The cumulative system in Illinois did not originate in any abstract theories of representation, but in the fact that the Democrats had an overwhelming majority in the southern part of the state and the Republicans an overwhelming majority in the northern part of the state, and that the antagonism between the two sections produced much unnecessary ill feeling in Illinois politics. It was hoped to break up the solid South and the solid North of the state by securing minority representation in each section.

[2] See table below, p. 527, note.

A serious attempt was made in the New York constitutional convention of 1894 to increase the term, but without avail. On that occasion, Mr. Bush argued against any change, declaring that it was to the best interest of the state to have the members of the assembly returned to the people every year in order that the latter might pass upon their acts. "You take away the dread," he said, "that the average member of the assembly has that his constituents at home are watching his acts and will pass upon them at the coming election and you will take away one of the greatest incentives to right action." [1]

Experience and practice, however, seem to argue against this position. When a member is elected for one year, unless he has already served one or more terms in the legislature, he hardly has time to learn the rules of the body before his period of service expires; and if he contemplates reëlection, he must devote a considerable portion of his energies every year to "nursing" his district. As everybody knows, effective work in a legislature can only be done by a man of experience — notwithstanding the best intentions. A district can be effectively represented only by a man who is able to accomplish results.

The legislator must have the qualifications of a voter of the commonwealth, and several states fix an age limit, differentiating between members of the senate and of the lower house. An examination of the composition of our state legislatures by Dr. S. P. Orth shows that they are fairly representative of the diverse elements of our population.[2] In the senate of Vermont, in 1904, for example, there were nine farmers, four lawyers, four physicians, thirteen merchants; three were college graduates, seven had received training in professional schools, seven had been educated in academies, and thirteen had never gone beyond public schools. Of these men, twenty-seven had had considerable previous political experience; one had been township clerk for thirty-five years; another, during his career, had held most of the town offices; and some had had both legislative and official experience. In the Vermont lower house of the same year there were 252 members; of these 123 were farmers, six were lawyers, ten were physicians, forty-eight were merchants and manufacturers,

[1] *Revised Record of the Convention*, Vol. III, p. 1021.

[2] S. P. Orth, "Our State Legislators," Atlantic Monthly, Vol. XCIV, pp. 728 ff. Parts of the article are simply condensed in the above text.

three were bankers, five were preachers, six were insurance writers, two were hotel proprietors, three were liverymen, fourteen were laborers or artisans, and six apparently had no occupation except that of general politician and office-seeker. "One member, says Mr. Orth, "made his daily bread by occasional speculation." One member was a lawyer, farmer, and breeder. Another was town clerk and treasurer and clerk in a general store. But the most versatile of this coterie of men was one who professed to be at the same time a furniture dealer and undertaker and miller and dealer in grain and feed. Of the members of the lower house seven-eighths had held public office, some of them for fifteen, eighteen, twenty, and thirty-six years; but strange to say, — and this is a significant fact, — only nineteen of the total number of senators and representatives had ever sat in a former legislature. The great majority of them, therefore, had had no practical experience for legislative work.

Mr. Orth has taken Ohio as a type of a populous state in which manufacturing, mining, and agriculture are nearly of equal importance. In the senate of thirty-three members, fourteen were lawyers, and there were nine business men, two teachers, two editors, two farmers, and one physician; one-third were college men, another third had received some training in academic, normal, and professional schools, while the remainder had completed their education in the common schools. Only one-half of them had been office-holders and twenty-seven of them had had no previous legislative experience whatever. Of the 110 representatives in the lower house of the Ohio legislature, about one-third were lawyers, one-fifth farmers, one-sixth business men; and there were ten teachers, five physicians, three editors, one preacher, ten laborers and artisans, two auctioneers, a commercial traveller, a law school student, a court crier, a music composer "with a national reputation, being the author of many works on music and over 100 piano compositions, many of which had proven very popular." Of the members of the lower house two-thirds had never held office, while three-fourths had never had any legislative service.

A further analysis of our state legislatures shows that the features prominent in Vermont and Ohio are quite common in the other states. The members are of the same miscellaneous character: lawyers, farmers, merchants, and representatives of

that large portion of the American population that earns its livelihood by a variety of methods. Our legislatures are therefore not expert law-making bodies, and it is often difficult to find in many of them even a small group of men, prepared by training and experience, to undertake legislative work of the highest quality.

On the other hand, the representative character of our legislators is apparent. While the working class has relatively few of its own spokesmen, all of the other miscellaneous groups in society are certainly fairly well represented. The legislature, therefore, comes closely into touch with the real interests, prejudices, and customs of the people; and this is the most important feature of representative government.

In all the states members of the legislature are paid.[1] Several

[1] Pay and Terms of Members of Legislatures

States and Territories	Salaries of Members, Annual or per Diem, while in Session	Terms of Members, Years		States and Territories	Salaries of Members, Annual or per Diem, while in Session	Terms of Members, Years	
		Senators	Representatives			Senators	Representatives
Alabama	$4 per diem	4	4	Nebraska	$600 sess.	2	2
Arizona	$7 per diem	2	2	Nevada	$10 per diem	4	2
Arkansas	$6 per diem	2	2	New Hampshire	$200 term	2	2
California	$1,000 term	4	2	New Jersey	$500 ann.	3	1
Colorado	$1,000 per term	4	2	New Mexico	$5 per diem	4	2
Connecticut	$300 ann.	2	2	New York	$1,500 ann.	2	1
Delaware	$5 per diem	4	2	North Carolina	$4 per diem	2	2
Florida	$6 per diem	4	2	North Dakota	$5 per diem	4	2
Georgia	$4 per diem	2	2	Ohio	$1,000 ann.	2	2
Hawaii	$600 ann.	4	2	Oklahoma	$6 per diem	4	2
Idaho	$5 per diem	2	2	Oregon	$3 per diem	4	2
Illinois	$3,500 term	4	2	Pennsylvania	$1,500 sess.	4	2
Indiana	$6 per diem	4	2	Porto Rico	$7 per diem	4	4
Iowa	$1,000 session	4	2	Rhode Island	$5 per diem	2	2
Kansas	$3 per diem	4	2	South Carolina	$200 sess.	4	2
Kentucky	$10 per diem	4	2	South Dakota	$5 per diem	2	2
Louisiana	$5 per diem	4	4	Tennessee	$4 per diem	2	2
Maine	$400 ann.	2	2	Texas	$5 per diem	4	2
Maryland	$5 per diem	4	2	Utah	$4 per diem	4	2
Massachusetts	$1,000 ann.	1	1	Vermont	$4 per diem	2	2
Michigan	$800 ann.	2	2	Virginia	$8 per diem	4	2
Minnesota	$1,000 sess.	4	2	Washington	$5 per diem	2	2
Mississippi	$500 session	4	4	West Virginia	$4 per diem	4	2
Missouri	$5 per diem	4	2	Wisconsin	$500 sess.	4	2
Montana	$10 per diem	4	2	Wyoming	$8 per diem	4	2

[1] Nearly all the states and territories pay mileage also.

of the constitutions prescribe the amount; and other constitutions, which leave the determination of the compensation to the legislature, forbid any increase during the term of service. Some commonwealths provide a definite annual salary, as for example New York, which pays each member of the senate and the assembly $1500 per annum. Other states make a per diem allowance, combining this with a limitation on the length of the session or at least on the number of days for which payment can be drawn. Oklahoma, for example, has provided that the members of the legislature shall receive $6 per day for a term of sixty days and only $2 per day after the expiration of that period.

It was for a long time a tradition of our politics that legislatures ought to assemble frequently, but our experience with legislative achievements has led many of the states to regard the legislature more or less as a nuisance. The old rule provided for annual sessions, but it is now followed only in Georgia, Massachusetts, New Jersey, New York, Rhode Island, and South Carolina. The great majority of states have provided for biennial sessions, while one state, Alabama, has a quadrennial session, but finds special sessions necessary, especially to deal with financial measures.

The length as well as the frequency of legislative sessions is subject to constitutional limitations. Several states have fixed a definite period — varying from forty to ninety days — during which the legislature may remain in session. Others have sought to check legislative labors by reducing wages after the expiration of a certain time.

Indeed, it seems that our constitutions have gone too far in the direction of curtailing the legislative session.[1] The legislative reference librarian of Indiana recently declared that the limited biennial session of sixty-one days in that state placed the legislators under a severe nervous strain to accomplish the absolutely necessary work. The argument in favor of this restriction is

[1] Mr. Ernest Bruncken proposes to abolish the time limit on the legislative session and divide it into two parts — the first for the introduction of bills and reference to committees, and the second part (after an adjournment for a substantial period, say three months) for the discussion and passage of such bills, the introduction of new bills in the latter part being forbidden, except under very strict control. Political Science Review for May, 1909. California adopted this idea in 1911.

that where the time at the disposal of the legislators is limited, their attention will necessarily be devoted to only the most important matters, while the local and special legislation and the pet schemes of "the politicians" will be perforce excluded from consideration. At all events, it is urged, this limitation of the time will reduce the quantity of the unwise legislation from which our states have long suffered.

Nevertheless, this seems to be the wrong way of improving the quality of our laws. In a short session, where there are so many members devoid of legislative experience, a good portion of the time is consumed in getting down to work; and no opportunity can be afforded for hearing favorable and adverse interests on important measures. Thus it seems that, while we may reduce the quantity, it will be well-nigh impossible to improve the quality, by limiting too closely the time at the disposal of our legislators.

The Powers of State Legislatures

A hundred years ago, a commentator on our state constitutions would have given little time to a consideration of the *powers* of the legislature; but to-day any examination of our state legislature at work must be prefaced by an account of the constitutional limitations under which it must operate.

At the outset, of course, there are those limitations laid down in the federal Constitution,[1] which are common to all states, forbidding the legislature to emit bills of credit, coin money, pass ex post facto laws or laws impairing obligations of contract, or to make or enforce laws abridging the privileges and immunities of United States citizens, or to deprive persons of life, liberty, or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws. It has been pointed out above how the Fourteenth Amendment to the federal Constitution is frequently called into play to check our state legislatures. At all times, therefore, they must look well into their laws in order to shape them in such form as to escape the wide sweep of this provision.

The general limitations imposed on legislatures by our state constitutions fall into six groups: In the first place, there is the bill of rights guaranteeing jury trial, religious freedom, and liberty

[1] See above, chap. xxii.

of press and speech, securing to the citizen the ancient right to the writ of habeas corpus, and forbidding the legislature to take private property for public use without compensation. In the second place, there is usually a group of provisions controlling the legislature in dealing with corporations, forbidding it to grant special charters of incorporation or special privileges of any kind. The third group of limitations control the financial power of the legislature, restrict its capacity for incurring debts, compel it to make provision for paying the interest and ultimately the principal of all money borrowed for public purposes, and secure publicity for financial measures during their passage. In the fourth place, the constitution provides the framework of the state government, defines the terms and powers of the various officials, and prescribes the qualifications for voters, thus placing these matters beyond the reach of the legislature. In the fifth place, the state constitution generally lays down some fundamental principles with regard to local government, public institutions, and education.

There is finally (6) the very important group of restrictions on the power of the legislatures to pass special and local laws. All statutes fall into two classes: (*a*) general or public laws; and (*b*) special or local laws. The former apply equally to all persons or special classes of persons throughout the state. For example, an act regulating the time of opening the polls on elections throughout the state would be a general law. Likewise a statute compelling all manufacturers to maintain certain sanitary standards in their shops would be a general law. A special or local law, on the other hand, is one applying to some particular person or corporation or locality — township, county, or city; for example, a law requiring a county to build certain bridges and lay out a certain highway would be a local or special law. An act exempting some city or profession or corporation from the state taxes regularly imposed upon all citizens, would be a special law. It can be seen at a glance how easily corrupt and pernicious legislation could be enacted in favor of local and special interests by a legislature having no restraint upon its power.

The right to pass such laws has produced two unfortunate results wherever it has been freely given to a state legislature.[1]

[1] The following bills (selected from a long list) introduced into the Albany legislature in 1910 give some idea of the character of an enormous mass of local business which must be dealt with under the present conditions:—

In the first place, it has led localities and corporations to exert powerful influences to secure special favors and has introduced lobbying, bribery, and log-rolling. In the second place, the amount of special and local legislation pushed by interested parties in every legislature is so great as to obscure the more important public measures, and to occupy the time of the members with business of slight importance to the public at large. Every legislator is usually under heavy pressure from his constituents and from corporations in his locality to secure the enactment of special laws. Thus the time of the individual members and of the entire legislature is largely consumed with such matters.

This has doubtless had a decided effect on the quality of men willing to enter the state legislatures. Very few men of high standards and qualified to deal with great public questions are willing to waste their time in trying to get an iron bridge over Duck Creek in Posey township or in securing some special favors for a local railroad corporation. Such business appeals, as a rule, to men of small calibre and also to men whose integrity is not of the best.

Practical experience with the unrestrained power of the legislature to pass local and special laws has led our state constitution-makers to adopt a variety of limitations on this type of legislative activity. A common form of such limitation is a provision to the effect that no special laws shall be passed in cases which can be covered by a general law. Another method is to enumerate a large number of subjects with regard to which the state legislature cannot enact special legislation; sometimes the constitution provides some twenty or thirty such topics, including regulation of the rate of interest on money, granting of special acts of incorporation, changing county seats, remitting fines, and granting divorces.[1] A third way of providing against unwise local legislation is to classify the cities into two or more groups, according to their population, and compel the legislature, in

Senate 77. Amendment of New York City charter authorizing the board of estimate and apportionment to lay out sites for playgrounds within specified area in Brooklyn.

Senate 92. Fixing a five-cent fare in Brooklyn from Flatbush Avenue to Railroad Avenue.

Senate 182. Legalizing a sewer bond issue of the village of Depew.

[1] *Readings*, p. 458.

legislating for municipalities, to make each law cover one or more of the groups. Thus, for example, the constitution of New York provides that there shall be three classes of cities according to their population.[1] Other state constitutions simply declare that special and local laws shall not be passed at all. However, such a provision is easily evaded by the legislature by a simple process. It may provide, for instance, that a certain law shall apply to all cities of over 200,000 inhabitants within the state when there is, as a matter of fact, only one city in that class; and this practice has been upheld by the courts.

Another check on local legislation is the device of giving the community affected the right to pass upon each law applicable to it. This has been adopted in New York with regard to special laws affecting cities.[2] Still another device, adopted in Vermont, New York, Oklahoma, and several other states, is to require the publication of any proposed special law in a newspaper circulating in the locality affected, thus enabling the citizens to take action upon the measure before it is passed.

The effect of these various limitations has undoubtedly been to reduce the quantity of local and special legislation, but it can hardly be said that the problem has been solved satisfactorily. A vast amount of such legislation is absolutely necessary, and where the limitations on the legislature are too strict, subterfuges of one kind or another have to be adopted.[3] Certainly much could be gained by giving more autonomy to localities.

Legislative Organization and Procedure

In organization and procedure our state legislatures follow, quite generally, the organization and procedure of Congress. In taking up this branch of state government, therefore, we encounter the party system, the speaker, and the committee, just as in Congress. The lieutenant-governor, where such an officer is provided for, generally presides in the state senate and occupies a position analogous to that of the Vice-President at Washington; and the lower house of the legislature, like the House of Representatives, elects its own speaker. The chief difference between the two legislatures in this regard is due to the

[1] See *Readings*, p. 512. [2] *Ibid.*, p. 512.
[3] For proposed remedies, *Readings*, pp. 467 ff.

fact that our state constitution-makers are not willing to give to the legislature the same freedom in conducting business that is enjoyed by the Congress at Washington. There is frequently in state constitutions a group of limitations designed to secure regularity, publicity, and due deliberation in the discussion of measures.

At the very outset we encounter the party caucus in the state legislature. In the caucus of the majority party, the speaker of the lower house is chosen; and the general measures to be carried by the legislature are likewise determined. Here it is that party organization gets in its work. Here it is that members who, if left to their own devices, would be independent, are brought to realize that practically the only hope for securing a consideration of their own measures is submission to the general policy of the party. It is the caucus that keeps discipline in the ranks; and usually, by the force of circumstances, the caucus is dominated by a small and experienced group of legislative workers.[1]

The speaker in the lower house of the state legislature is nominally chosen by that body, but, as we have seen, in reality by the caucus of the majority party. Like the Speaker at Washington, he enjoys an enormous power if he has tact and the capacity for securing it. He usually appoints the committees, and by a judicious distribution of the members, he is able to secure the predominance of his own friends on every important committee.

Owing to the fact that a large number of the members are wholly inexperienced in legislative business, the speaker is often able so to distribute the bills among committees as to decide the fate of measures. He usually has at his side, like the Speaker at Washington, a committee on rules, or perhaps a group of his followers who, acting in coöperation with him, practically determine what measure shall come up for consideration. However, it can hardly be said that the speaker in the average state legislature enjoys an authority over the house comparable to that formerly enjoyed by Mr. Reed or Mr. Cannon at Washington.

[1] Great outcry has been made by reformers against the caucus system and the discipline which it imposes upon members of the legislature, but it may be doubted whether such discipline is more stringent than that imposed by the cabinet system in England. However, it should be remembered that the men who dominate the party caucus in the state legislature are not responsible as are the cabinet officers in the English Parliament. Lowell, *Government of England*, Vol. I, p. 453.

As at Washington, a great deal of the legislative work is done by committees. Among those to be found ordinarily in the legislature are the following: finance, ways and means, judiciary, affairs of cities, railroads, canals, commerce and navigation, codes, insurance, taxation and retrenchment, banks, forest, fish and game laws, internal affairs of towns and counties, military affairs, miscellaneous corporations, public education, public health, penal institutions, revision, affairs of villages, agriculture, printed and engrossed bills, Indian affairs, trade and manufactures, privileges and elections, public printing, roads and bridges.

Legislative committees, of course, are not all of equal importance. Perhaps first in the list ought to be placed the committees which deal with financial measures, commonly known as the committee on finance in the senate and the committee on ways and means in the house. If there are great cities in the state, the committee on cities is, naturally, high in rank. The committee on the judiciary also enjoys great power because it often has referred to it, under the cover of questions of constitutionality, important measures, such as primary legislation and election laws. In addition, it frequently has to review amendments to the existing statutes.

It is the business of a legislative committee to consider carefully measures referred to it, and to hear the various interests for and against — though in practice, of course, only a few bills receive this treatment. The law of New York makes definite arrangements for committee hearings. It provides that any legislative committee may require the attendance of witnesses in the state or issue a commission for the examination of witnesses who are out of the state or are unable to attend the hearing; any person acting as a witness is allowed the same fees that are paid to witnesses in civil actions in courts of record; and whenever a committee is instructed by resolution of either house to undertake an investigation outside of the city of Albany, its actual and necessary expenses are paid. In practice, of course, the hearings on important bills are attended by advocates and opponents who are not regarded as witnesses and are not paid for their services.

The committee system in the Massachusetts legislature seems to have reached the highest point of development. "In that state," says Professor Reinsch, "committee hearings are a very

important part of legislative action. Notice of all hearings is given in the public press, and the committee meetings are well attended, not only by people who have an axe to grind, but by citizens of the state who interest themselves in legislative reforms. All testimony brought before the committees is carefully weighed; in fact, the legislature and its committees assume rather a judicial attitude. Petitions are brought before them, testimony is given, arguments are made, and they can generally decide the matter impartially upon the basis of all these considerations."[1]

The value of the committee system, where it is honestly worked, is undoubted. It enables a few members to become fairly experienced in some particular subject. Through the system of hearings it not only gives to the legislature the arguments on both sides of each question, but it partially determines the extent of the public demand for each measure by bringing the legislature closely in touch with those interests and groups of citizens most vitally affected by it. It enables the legislatures to adapt their work more precisely to the concrete social and economic conditions which they are attempting to regulate. Finally, it helps to prevent hasty and ill-considered legislation. On the other hand, the committee system has its disadvantages, for it is by the committee that good measures are often smothered or riddled by amendments, and pernicious measures carried through the legislature without adequate scrutiny.

Nebraska, impressed with the need of reform in the prevailing committee system, made, in 1914, a thoroughgoing investigation into legislative organization and procedure and three years later brought about the following important changes:

1. The number of committees was reduced — 42 senate committees to 28 and the 47 house committees to 30.

2. Definite hours were set for committee meetings.

3. Records of committee meetings were to be kept and made a part of the report on the bills considered.

4. Final action on bills was to be taken by committees only during the daylight hours, thus preventing "snap" meetings to push through measures while objectors were absent.

5. Schedules of committee meetings were to be printed so that every one could know the hours of each committee.[2]

[1] *American Legislatures*, p. 174.

[2] A. E. Sheldon, in the American Political Science Review for May, 1918.

The actual procedure in our state legislatures it is difficult to present in any systematic form. The rules, it is true, are usually explicit enough as they appear in the clerk's manual, but, as we have seen in our study of Congress, the formal rules are not always followed in practice. There are, however, certain matters connected with the procedure which can be put down in a fairly definite manner.

In the first place, there are generally some constitutional limitations on procedure. It is often provided that laws must always be passed in the form of bills; and that each bill must cover only one subject expressed clearly in the title in order to prevent the coupling of many vicious bills with a good one or to prevent the insertion of totally distinct matters. There are commonly some stipulations to the effect that former statutes may be amended only in such a way as to make clear the exact change that has been made in the law. It is a common custom to require three different readings of every measure passed, and to prohibit the introduction of bills after the expiration of a certain part of the session, so as to prevent rushing through pernicious measures during the closing hours of the session. These and other constitutional provisions control the actual operation of the state legislature, and, in some instances at least, the courts will enforce them if they are neglected by the legislative body. Ordinarily, however, we must admit, with Professor Reinsch, that "the observation of the rules of procedure is very largely dependent upon the will and purpose of the majority in the legislative body. The leaders do not often find it difficult to arrive at an understanding with the minority under which legislation can be carried on largely by common consent. This lax procedure has been encouraged through the general apathy of the people toward the state legislatures."

The second fairly definite group of rules of procedure are those designed to secure publicity in the consideration of measures. The constitution of New York, for instance, provides that no bill shall be passed or become a law unless it shall have been printed and upon the desks of the members in its final form at least three calendar legislative days prior to its final passage, except in case the governor or the acting governor shall have certified to the necessity of its immediate passage; at the last reading of a bill no amendment may be made; the question upon its final passage

must be taken immediately afterward, and the yeas and nays entered on the journal.[1] The rule that no bill shall be introduced during the last few days is also intended to secure publicity, but it is commonly nullified by the necessary qualification allowing such an introduction of measures either by unanimous consent or by the consent of a large portion of the members of the house.

To give some concrete idea of the general character of legislative procedure we may take up the practice of a well-ordered legislature. A bill is introduced in the lower house by any one of four methods: by a private member who may deposit it in a box near the speaker's desk,[2] by the report of a committee, on the order of the house, or by a messenger from the senate. At the close of each day's session the bills deposited in the bill box are handed to the speaker, and at the next regular session the speaker announces the introduction of the bills for their first reading and thereupon refers them to appropriate committees with the consent of the house.

All bills after their first reading in the assembly are referred to standing or select committees for consideration and report. If a bill is favorably reported and the report is approved by the house, the bill is then placed on the order of second reading. If the report is adverse and is approved by the house, the bill is considered rejected.

When a bill is placed on the order of second reading, it is then subjected to debate, being considered section by section — unless, by unanimous consent, it is advanced to the third reading. When a bill passes the second reading and is ordered to the third reading, it is referred to the committee on revision, and then it goes to the committee on engrossed bills, where it is put in final form and laid on the desk of the members sometime before the final reading. When a bill is ready for its third reading, it is placed on the proper calendar and taken up at the proper time. Unless there is a demand, the bill is not read through. If some member wants to reopen debate on the bill, he moves to strike out the enacting clause.

The proceedings in the senate of the average legislature are very much like those in the house, except that the committee

[1] On the origin of this provision, see *Readings*, p. 466.

[2] The member may also rise in the assembly and introduce a bill, but this practice is seldom adopted.

of the whole sometimes takes the place of the order of the second reading as conducted in the house.

To prevent unnecessary delay in the New York assembly, the rules provide that no member shall speak more than twice on one question, without leave of the house; and furthermore that no member shall speak more than fifteen minutes at a time except with the consent of two-thirds of all the members present. Debate is closed by the motion that the main question be put, and until it is decided this motion precludes all amendments or debate. In the senate, when any bill, resolution, or motion has been under consideration for six hours, it is in order for any senator to move the closure, and such motion must be put immediately. If it receives the approval of a majority of the senators, the vote is thereupon taken upon the pending question, without further debate, except that any senator who desires to do so is permitted to speak on the measure for one-half an hour at most.

Some notion of the practical experience of legislators, especially new men, can be gathered from the following somewhat humorous account[1] by a member of the New York assembly: "Before I came up here I had an idea that a legislator, after a profound study of the subject, would introduce a bill with a few words that would at once attract the attention of the press and through them the public. Presently, by some machinery which I never clearly understood, the bill would be taken up in its turn and after grave and serious argument would either be passed or defeated. But what really happens is this. You sneak up back of the desk and drop into a slot your bill, which half the time you don't know anything about yourself, because either your boss, or your senator, or some organization in your district, gave it to you. By bothering the clerk next day you can find out what committee it has been referred to. If you are a member of the committee, there is a good chance to get it reported, because the other members of the committee want your vote to get their own bills out. If not, you are a hundred to one shot, unless your senator comes over and sees Wadsworth [the speaker of the assembly] or Merritt [the floor leader of the majority] about it. The next thing you do is to ask for a hearing on the bill. You find out who is the chairman and hunt him up. When he sees you are only a first-year man, he insists in mistaking you for a doorkeeper or messenger, just to

[1] New York Evening Telegram, February 25, 1908.

let you know your place. After you get that straightened out and tell him what you want, he pulls a long face and talks about the flood of bills they have to consider. That's all you can do. If the committee, or rather if two or three men on the committee, are willing to give your bill a chance, you may get it out after begging like a college president. Once on the calendar, instead of the chairman of the committee, you have one man, Merritt, the Republican floor leader, to convince before you can get a vote on the bill at all. They say it's even worse over in the senate, but it's bad enough here. All a new assemblyman is good for is to vote as he is told. If he doesn't do that, never a bill of his will see daylight. The committee holds the power of life and death over a bill, and Wadsworth and Merritt hold the committee in an iron grip."

As a matter of plain fact, a great portion of our legislation is done in the most hasty and irregular manner. The members usually waste from one-third to two-thirds, if not more, of the session, and then the measures are rushed through during the closing hours with little regard to the actual rules. An illuminating glimpse of real procedure is given by the following extract from a pamphlet prepared by the Illinois Legislative Voters' League of 1903: "Consider the petty annoyances to which a decent member outside the 'organization' may be subjected, and the methods by which legitimate legislation, backed by him, may be blocked. The bill goes to an unfriendly committee. The chairman refuses to call the committee together, or when forced to call it, a quorum does not attend. In case a quorum attends, the point may be raised that the bill is not printed, or the chairman may fail to have the original bill with him. Action may be postponed on various pretexts, or the bill may be referred to a subcommittee. The committee may kill the bill by laying it on the table. On the other hand the committee may decide that the bill be reported to the house to pass. Then a common practice is for the chairman to pocket the bill, delaying to report it to the house till too late to pass it. When finally reported to the house, it goes on the calendar to be read a first time in its order. Then begins the advancing of bills by unanimous consent, without waiting to reach them in order. Here is where the organization has absolute control. Unanimous consent is subject to the speaker's acuteness of hearing. His hearing is sharpened or

dulled according to the good standing of the objector or of the member pushing the bill. If one, not friendly to the house 'organization' wants to have his bill considered over an objection, he must move to suspend the rules. The speaker may refuse to recognize him, or may put his motion and declare it carried or not carried as suits his and the organization's desires. So the pet bills are jumped over others ahead of them on the calendar, while the ones not having the backing of the house 'organization' are retired farther and farther down until their ultimate passage becomes hopeless. If the bill of the independent member reaches a second reading, it may be killed by striking out the enacting clause or by tacking on an obnoxious amendment that makes it repulsive to its former friends. A referendum, requiring, not a majority of those voting on the bill, but a majority of all the votes cast at the election to adopt it, is a new and favorite method of shelving a bill by amendment. To carry out the will of the organization, the speaker declares amendments carried or the contrary on viva voce vote. Demands for roll-calls are ignored by him in violation of the members' constitutional rights. This is called 'gavelling' a bill through. Formerly the gavel was used to carry through political measures of the majority party and to prevent obstructive and dilatory tactics of the minority party. By a gradual growth it has come to be used to help or defeat legislation in which the organization has an interest, although the majority may have a contrary view. What the speaker declares, the clerk must record, and what the clerk records, no court will set aside."

Faults in State Legislation and Proposed Remedies [1]

When one considers the enormous mass of business which is transacted by our state legislatures, — even where long sessions prevail, — principally during the rush of the closing hours, it is

[1] A recent critic of American methods of legislation, Mr. Ernest Bruncken, sums up (in the Political Science Review, for May, 1909) the evils of our excessive legislative activities as follows: Owing to the prolixity, confusion and constant amendments of our laws it is almost impossible for the layman or lawyer to say what the law is on any subject; the legislatures, in drafting laws, all too frequently ignore the most common rules of adjudication employed by courts; there is a constant tendency to neglect the effect of any new statute upon the existing body of law; many of our bills are drawn by

small wonder that there is a vast amount of irregular, hasty, and pernicious legislation. Hon. Alton B. Parker has stated that each year we add some 25,000 pages to our statute books, whereas in a period of six years (1899–1905) "the English parliament, legislating for the need of forty-two millions of home population and millions of dependents, passed an average of only forty-six general and two hundred and forty special laws." Of course, it must be remembered that when we total the pages of statutes throughout the United States, we have many duplicates, for all the legislatures are compelled to cover practically the same subjects. However, compare Wisconsin with England. During the same period, the Wisconsin legislature, meeting biennially, enacted, for a population of two million inhabitants, 1801 laws, or on the average 450 laws a session. Professor Dealey has estimated that in 1901 our state legislatures passed 13,584 laws; in 1903, 14,098 laws; and in 1905, 13,172 laws. In New England, special legislation was seventy-six per cent of the total, but in other states where such legislation is more restricted it formed but twenty-eight per cent of the total. In the five years from 1899 to 1904 the total number of acts passed by American legislatures was 45,552, of which only 16,320 were public laws.

The bad quality of a great deal of our state legislation may be attributed to other causes than to haste and quantity.[1] Professor Freund has assigned most of our shortcomings in this matter to the following causes: first, an absence of responsibility, due to the fact that any member of the legislature may introduce as many bills as he pleases without assuming any responsibility for them, and also to the fact that the governor in many states does not have sufficient time at the close of the session to consider the great mass of measures placed in his hands; secondly, the lack of expert advice, much of our legislative work being done by inexperienced men unaided by technical service; and thirdly, the

men who are not lawyers and do not have even the most elementary knowledge of legal requirements; the practice of log-rolling leads to the passage of countless measures without any adequate scrutiny; our legislatures are so organized and conducted as to prevent the discussion and detailed consideration of bills; there is generally little or no attempt to unify the output of each legislative session.

[1] In 1913 the governor of Kansas proposed to substitute a small commission for the state legislature.

failure to confine the exercise of legislative power to measures shown by long experience to be wise and prudent though temporarily inconvenient or disappointing in the production of immediate results.[1]

Mr. Bryce, on the other hand, attributes most faults of our state legislation (1) to the system of selection by party conventions which favors the entrance of bad men and tends to shut out good men; (2) to the habit of restricting the choice of members to residents in the electoral district, thus excluding much of the best talent in the state; (3) to the fact that the capital of the state is frequently a small town removed from the great cities of the state and thus sheltered from the publicity of the metropolis; and (4) to the fact that while the business which comes before the legislature is important, it fails to excite much interest among the people.

Undoubtedly, one of the most serious defects in our state legislation is due to the want of technical skill in drafting the laws and to the improper adjustment of amendments to the existing law. In the English parliament there is an expert bill drafter, a high-salaried and skilled lawyer, who helps to give the laws the form necessary to accomplish their purpose and assists in fitting them to the older statutes; but in the United States most of our laws are drawn up in a haphazard fashion by irresponsible persons in and out of the legislature. Some of the most important public laws, designed to achieve large reforms of one kind or another, are drafted without remuneration by persons outside of the legislature, interested in the proposed legislation. Another portion of our laws, especially those affecting private interests, are drafted by high-salaried persons in the employ of corporations, and while they are usually wanting in none of the technicalities that make for the accomplishment of their purpose, they often contain clauses whose full import is only understood by the private parties interested in them. Other bills frequently are drafted in a careless fashion by private members who are entirely without any technical legal knowledge, and sadly deficient in their comprehension of the plain terms of the English language.

Some attempts have been made to remedy these technical defects. New York, for example, provides by statute that the temporary president of the senate and the speaker of the assembly

[1] *Proceedings of the American Political Science Association* (1907), p. 69.

shall appoint a number of competent drafters whose duty it shall be, during the session of the legislature, on the request of either house, or of a committee, member, or officer thereof, to draw bills, examine and revise proposed bills, and advise as to the consistency and legal effect of any legislation. As a matter of fact, however, this group of supposed experts is by no means always consulted.

The chief cause of bad legislation — in a social sense — is the pressure exerted on behalf of sinister private interests seeking special favors at the hands of the legislature. "There is hardly one of the many and widely diversified interests of the state," says Mr. Roosevelt, "that has not a mouthpiece at Albany, and hardly a single class of these citizens — not even excepting, I regret to say, the criminal class, which lacks its representative among the legislators." [1] The sinister elements are also represented outside of the legislature by organized lobbyists, bringing every imaginable kind of pressure to secure the enactment of special laws. The far-reaching ramifications and the splendid organization of a lobby were revealed by the famous insurance investigation in New York.[2] A powerful interest that wishes to secure some favor will maintain a representative at the state capital for the purpose of becoming acquainted with those members of the legislature who can be reached by one of many influences — by social considerations, money, or fear of being defeated for reëlection. On the other hand, corporations are often forced to maintain lobbyists to defeat "strike" bills brought in for the purpose of extorting money from them.[3]

Several of the states have sought to rid our legislatures of the undesirable elements by statute. New York, for example, has provided that every person retained or employed for compensation as a counsel or agent by any person, firm, corporation, or association, to promote or oppose, directly or indirectly, the passage of any bill or resolution, by either house, or to influence executive approval of any such bill or resolution, must be registered every year (before entering upon any such service) in the office of the secretary of the state, and must give the name of the person or association by whom he is retained and at the same time

[1] *American Ideals*, pp. 63–66. [2] See *Readings*, p. 482.
[3] *Ibid.*, p. 484.

furnish a brief description of the legislation for or against which he is working. The law requires also every person or corporation to file in the office of the secretary of the state a complete account of all the money spent in influencing legislation during the immediately preceding session. The duly accredited agents of counties, cities, towns, villages, public boards, and public institutions are exempted from the provisions of this law, but penalties are imposed upon all others failing to observe its terms.

The Wisconsin law against lobbyists prescribes that legislative agents or counsels must not attempt to influence members privately, but must confine themselves to arguing before committees and filing printed briefs with the members of the two houses. Undoubtedly this legislation has had a useful effect. An observer of the law of Wisconsin states: "The effects of this law have been most salutary. The lobbyists who formerly frequented the halls of the capitol and crowded the corridors of the hotels from the beginning to the end of the session have disappeared. There is no longer ... any chance for the exercise of that sinister influence which, disguised as good fellowship and exerted mainly in barrooms, commits members in advance to the support or opposition to bills of which they know nothing." [1]

Another important deteriorating influence in our legislation is the lack of practical information with regard to bills brought up for the consideration of the legislature; but happily, however, some serious attempts are being made to remedy this difficulty. New York established in 1890 a legislative library which keeps a careful record of the legislation of all the states, and, in addition to maintaining a well-equipped library, issues valuable bulletins. In 1901 the Wisconsin legislature appropriated a small sum of money for a legislative reference library, and employed Dr. McCarthy, a careful student of economics and politics, to act as legislative reference librarian. Dr. McCarthy began at once a collection of materials bearing upon every kind of measure that might possibly come before the legislature of that state.[2] That body now has at its service a competent expert and a full supply of legislative materials; and any member is at liberty to

[1] The following states now have anti-lobby laws: Missouri, Nebraska, Idaho, South Dakota, and Massachusetts.

[2] See *Readings*, p. 473.

make the widest possible use of the materials and technical assistance at his disposal. This idea has spread to other states and undoubtedly contains the germs of a most important reform.[1]

To assist further in bringing order out of the chaos of state legislation, Wisconsin created, in 1909, the office of revisor, whose duties are as follows: "(1) to maintain a loose-leaf system of the statutes, separating those statutes in force from those repealed or superseded; (2) to maintain a loose-leaf ledger of court decisions referring to the statutes; (3) to present to the committees on revision of each house of the legislature, at the beginning of each session, bills providing for such consolidation and revisions as may be completed from time to time; (4) to keep an alphabetical subject card-index to the statutes; (5) to formulate and prepare a definite plan for the order, classification, arrangement, and printing of the statutes and session laws; and (6) to supervise and attend to the preparation, printing, and binding of such compilations of particular portions of the statutes as may be ordered by the head of any department of the state." [2]

Another method of bringing more definite information to bear on state legislation is being developed in the growing practice of creating special committees to investigate important technical problems, and prepare complete measures for the legislature. Notable examples of this practice are afforded in New York by the Stevens gas committee of 1904, which made a searching study of the conditions of gas manufacture, and furnished the basis for important legislation; and by the Armstrong commission of 1905, which thoroughly inquired into the life insurance business, and made startling revelations of chicanery and neglect of duty on the part of responsible officials, and then instituted important reformatory legislation.[3]

[1] Legislative reference departments have been established in Arizona, New Jersey, North Carolina, Virginia, Indiana, Rhode Island, North and South Dakota, Michigan, Pennsylvania, Nebraska, Vermont, Illinois, and many other states. The New Jersey law of 1914 created the office of legislative advisor and bill examiner, the incumbent to work in conjunction with the reference department of the state library. The duties include bill drafting, examination of bills, amendments, etc., to avoid repetitions and unconstitutionality and to insure accuracy, clearness, and consistency with existing legislation. American Political Science Review, February, 1916, p. 111.

[2] American Political Science Review for August, 1909, p. 421.

[3] For the methods employed by the committee, see *Readings*, p. 471.

There is one fault in our legislatures which neither technical bill drafting nor changes in political machinery can overcome — that is the want of active interest on the part of the citizens at large, and especially their lack of practical knowledge of the work actually in progress in the legislature. Even where the state capitol is in a metropolis, the newspapers give relatively little space to the discussions, excepting the spectacular ones, which by no means always relate to the most important measures in the legislature. It is seldom that debates excite any considerable interest. No very important portion of the population keeps track of the bills of public interest; and, indeed, owing to the complications of procedure, it is difficult, even for the citizen with technical knowledge and a generous leisure, to follow measures through their various stages.

It was on account of this fact that the Citizens' Union of New York adopted a unique device for keeping citizens in touch with the legislative work at Albany which especially affects the metropolis. This Union has a committee on legislation which maintains a bureau at Albany during the entire session and secures, at the very earliest opportunity after introduction, every bill relating to the city itself. These bills are sent to the city, where an expert committee reviews them, considering their social and their technical character. If the committee comes to the conclusion that any especially important bill ought to receive the support of the citizens, it immediately begins a campaign of popular education on the question through the press and by means of the platform. If the committee comes to an adverse opinion, it conducts a campaign of protest.

The committee furthermore publishes an annual report, in which it reviews the measures passed or introduced affecting the city. It also takes up the general public laws relative to the whole state and the city incidentally. This annual report, furthermore, contains the record of each assemblyman and senator at the capital; it gives a complete list of the bills introduced by each; it states which way each voted on every important bill in the legislature; and it concludes with the expression of an opinion on the character of each member as an effective representative.[1]

[1] See *Readings*, p. 486.

CHAPTER XXVI

THE JUDICIAL SYSTEM

The Structure of the Courts

THE courts are the great tribunals of the citizen for the protection of his personal and property rights; and almost every one, in some capacity, comes in contact with the judiciary of his state. If he is a business man, he may have to resort to a court to collect a bad debt or a note, or to settle a dispute with a fellow merchant. If he is injured in an accident, he goes into a court to sue the responsible party for damages. He may have to appear as a witness to tell what he knows of the transactions involved in a lawsuit; or if he is unfortunate enough to have his pocket picked or his house robbed, he may testify against the offender. Then, practically every man not legally exempt, is liable, at one time or another during his life, to be called upon to serve on a jury, and thus himself become a part of the regular judicial machinery. Finally, if he dies leaving heirs, they may need the assistance of the courts in the distribution of his estate or in collecting his life insurance. These are only a few of the innumerable instances which illustrate the place of the courts in the life of the citizen.

The great mass of litigation is disposed of by the state courts.[1] The jurisdiction of the federal courts is specifically defined, and within somewhat narrow limits, by the Constitution of the United States.[2] Moreover, in many cases the state courts have a concurrent jurisdiction with the federal courts, and a litigant has a choice of tribunals before which to bring his suit.

In every state, the courts are arranged in a progressive series.[3]

[1] Reference, Baldwin, *The American Judiciary*, p. 125.

[2] See above, chap. xv.

[3] For the local courts, see below, chap. xxix; for the court of impeachment, above, p. 509.

At the bottom of the scale stand the justices of the peace, who have jurisdiction over civil cases involving very small amounts, and over petty offences. In large cities, the criminal and civil jurisdiction of the justices of the peace is sometimes divided between two sets of courts: the police courts and the municipal civil courts.

In most states there are county courts, generally of limited jurisdiction. They have cognizance of actions involving considerable sums and usually consider appeals from judgments of justices of the peace. They also have jurisdiction over most of the criminal offences. They are sometimes styled courts of common pleas or district courts. In some states, they have certain administrative functions in addition to their judicial duties.

Often there is a superior, circuit, or district court, immediately above the county court, which enjoys unlimited original jurisdiction in civil and criminal matters and may try all cases over which the lower courts have no jurisdiction. The judges of this tribunal are generally elected or appointed for districts larger than the county, but hold terms of court within the several counties of their district or circuit.

At the head of the judicial system of each state stands the appellate court of last resort, which ordinarily deals only with appeals on points of law, not of fact. It is known by various names, such as supreme court, court of appeals, court of errors and appeals, or supreme judicial court.

In addition to these courts, there are sometimes special tribunals for particular purposes: chancery courts, which administer equity;[1] probate or surrogates' courts for the settlement of estates of deceased persons;[2] children's courts dealing with offenses committed by children;[3] and courts of claims for hearing claims against the state.

The courts, with the exception of the very lowest, have clerks to keep the records of their proceedings and to perform ministerial functions such as the issue of processes and writs. In many states, the offices of county clerk and court clerk are com-

[1] Below, p. 554.

[2] *Ibid.*, p. 645. Where the latter are established, there is usually a separate one for each county. They are ordinarily known as courts of probate but in some cases as surrogates' courts, or as orphans' courts.

[3] *Ibid.*, p. 613.

bined in one person, who is an elective official.[1] In other states, however, there are separate clerks for the courts, in some instances appointed by the judges, and in others, particularly in the South and West, elected by the voters for short terms.[2]

An account of the judicial system would not be complete without some consideration of the prosecuting attorney.[3] In most states he is an elective county officer, but in some instances he is selected for districts larger than a county.[4] He represents the state in all criminal cases and conducts the prosecution. He makes preliminary investigations into crimes and determines whether a prosecution should be instituted. If he decides in the affirmative, he presents the case before the grand jury.[5] If the grand jury returns an indictment — that is, declares that the accused should be held for trial — the prosecuting attorney takes charge of the prosecution at the trial. In one respect, his functions are similar to those of the counsel for the plaintiff in a civil suit. Yet, in another way, he is much more than that. He should not be interested in securing a conviction at any cost. He is a quasi-judicial officer and is interested in getting at the truth and doing justice. In addition to performing his functions in criminal trials, he at times also represents the county in civil cases.

In the great majority of the states the judges are chosen by popular vote. The judges of the lower courts are elected for short terms; those of the higher courts hold their office for a longer period of time — usually varying from six to twelve years, but in a few states they are longer. Thus in New York the justices of the supreme court and the judges of the court of appeals are elected for fourteen years, while in Pennsylvania the term of

[1] A clerk is chosen for each county, even in cases where several counties are grouped in one judicial district, for it is desirable for each to keep its own records.

[2] There seems to be little reason for making the court clerk an elective official. His duties are generally purely ministerial and are performed under the direction of the judges, who ought to have the power of appointing and removing him. The highest court of the state has a separate clerk, who is also, in some cases, an elective officer.

[3] See below, p. 643.

[4] He is known variously as prosecuting attorney, district attorney, state's attorney, attorney for the commonwealth, county attorney, and county solicitor.

[5] For a discussion of the grand jury, see "Criminal Procedure," below, p. 571.

the judges of the supreme court is twenty-one years. In general it may be said that the tendency is toward the longer term because it makes the judges more independent of the politicians who happen to be in power for the moment.

There are some states that do not leave the selection of judges (especially of the higher courts) to the people. In Delaware, for example, the chancellor, chief justice, and associate judges are chosen by the governor and senate; and in New Jersey the justices of the supreme court, chancellor, judges of the court of errors and appeals, and judges of the inferior court of common pleas are likewise appointed by the governor and senate. In Massachusetts all judges are appointed by the governor with the approval of his council — a small body elected by popular vote. Other states — South Carolina, Rhode Island, Vermont, and Virginia — leave the choice to the legislature. In Massachusetts, New Hampshire, and Rhode Island the judges have practically life terms; but in other states the term is fixed at a number of years — twelve in Delaware.

There has been considerable controversy as to which of the three methods of choosing — namely, selection by the legislature, the governor, or popular vote — is the most advantageous to the cause of justice. It is generally agreed that the first is not at all desirable; the choice is only too often made by log-rolling tactics when it is intrusted to the legislature. On the other hand, there is much to be said on the merits of the other two methods — popular election and appointment by the governor. The friends of the former practice emphasize the fact that choice by the people seems to be the only democratic way of selecting important officials, for appointment by the governor renders the judges too independent of the popular will and tends to make them arbitrary. They point out also that, in the case of local judges, the people of the district are likely to know more about the qualifications of the candidates than the governor who is obliged to depend on recommendations of third parties — that is, on the recommendations of a local political machine.[1] Finally, the champions of the elective system point to the fact that on the whole it has worked successfully [2] and that excellent judges have been obtained under it. The higher courts of states like New York which have elective judges have generally been composed of men of unquestioned

[1] *Readings*, p. 493.

[2] *Ibid.*, p. 489.

integrity and legal learning; and judges who have served a long time are often renominated by both parties and thus reëlected practically without a contest. Finally, the advocates of popular election point out that in so far as judges have the power to declare laws void their functions are political, and therefore they should not be removed from popular control.

To offset these arguments, those who favor appointive judges say that where good judges have been obtained, they have been secured in spite of popular election, not because of it. Massachusetts, whose judges have always been distinguished for their high character and legal learning, is always cited as the state in which the appointive system has proved eminently successful. It is contended that the people do not have the capacity to pass upon qualifications required for a successful judge and often select the most popular man rather than the one most fit. Making the judge an elective officer, the advocates of the appointive system continue, renders him dependent on political leaders; party service — not fitness — is made a test for the office; in order that the republican form of government may be a success and justice done between man and man, the judiciary must be absolutely independent; the judge must feel that he need not come up for a renomination before the leaders of his party; he must not be afraid to render an unpopular decision which may perhaps cause his defeat if he is a candidate for reëlection. Therefore, they conclude, the appointive system is the only one which puts the judges in such a position.[1]

Akin to the older question of elective judges, is the newer issue of the recall of judges and judicial decisions. The adoption of these devices has been brought about by popular dissatisfaction with the action of the courts in declaring unconstitutional acts of state legislatures, particularly those dealing with labor and social reforms. As we have seen, some of the states which have adopted the recall [2] have refused to apply it to judges, while other states, Oregon, California, and Arizona, for example, apply it to all officers, including judges. And Arizona has attempted to apply it to federal judges (appointed by the President and Senate) in such a way as to allow the expression of popular opinion on such judges within that state. The machin-

[1] On this whole question of choice of judges, see *Readings*, p. 488.

[2] Above, p. 472.

ery for working the recall of judges is the same as that employed in the recall of ordinary administrative officers. It is likewise subject to the same variations.

The recall of judges had scarcely been adopted before a variation on the plan was evolved by Mr. Roosevelt. In a speech before the Ohio constitutional convention in 1912, he said: "Every public servant, no matter how valuable, and not omitting Washington or Lincoln or Marshall, at times makes mistakes. Therefore we should be cautious about recalling the judge, and we should be cautious about interfering in any way with the judge in the decisions which he makes in the ordinary course as between individuals. But when a judge decides a constitutional question, when he decides what the people as a whole can or cannot do, the people should have the right to recall that decision if they think it wrong." [1] A constitutional amendment embodying this proposal was adopted in Colorado in 1912, providing for the recall of the decisions of the supreme court of the state holding statutes unconstitutional. The procedure is simple; on the petition of a certain percentage of the voters, the question as to whether the decision of the court declaring a law null shall stand or not is submitted to popular vote. In a way, this is little more than setting aside a judicial opinion by a constitutional amendment — a thing which is frequently done without raising any serious controversy.

The arguments on this question of the recall of judges and judicial decisions are almost identical with those formerly employed when the question of popular election of judges was discussed.[2]

The salaries of judges are usually rather low in comparison with the compensation afforded to judicial officers in Europe, or with the income of the first-class practising lawyer. For example, the judges of the supreme court in Vermont receive only $4000 a year. There has been, however, a tendency in recent years to increase the salaries of judges, and in some states they are well paid. New York now pays the chief justice of the court of appeals $14,200 a year and the associate judges $13,700 each, while supreme court justices in certain districts receive $17,500 a year.

[1] *Readings*, p. 497.

[2] See Beard and Shultz, *Documents on the Initiative, Referendum and Recall*, pp. 55 ff.

The Sources of Law

I. The first great source of our system of jurisprudence is the English common law.[1] Its characteristic feature consists in the fact that its rules are to be found, not in some code enacted at one time by the legislature, as is generally the case on the continent of Europe, but in decisions of the courts spread over several centuries. The law is thus built up and developed by judicial precedents. To find what principle governs on some question of private law, a lawyer practising in a jurisdiction where the common law prevails must find what has been previously decided by the courts on that point and be guided by those decisions.

The common law began its development in mediæval England. When a case came before the royal justices, they tried to discover the prevailing custom on the subject and decide the question in accordance with it. Theoretically, they did not make the law, but merely formulated the customs of the community into legal rules and gave them an official sanction. As a matter of fact they did make law, for they interpreted the customs and had the power of selecting some and discarding others. When another case involving the same point was brought before the judges, they naturally followed the rule laid down in the decision of the first case. If, however, it was thought that the rule of the first case was incorrect or that conditions had changed, they would overrule the previous decision and work out a new doctrine. This flexibility is one of the best features of the common law. In this way a body of precedents was built up and a set of legal principles developed. When an entirely novel case came up, some "general principle" of the common law was invoked for its decision.

As the common law developed, it gradually became more and more crystallized and less flexible. The judges tended to be technical, and any litigant whose case did not fall within certain well-defined classes was liable not to be granted the relief really due him. In numerous instances in which obvious injustice was done there was no remedy at law.

These deficiencies of the common law necessitated the development of a new body of jurisprudence along with it. This new

[1] Louisiana, whose law is derived from the continental system, is an exception. There are some southwestern states which are not regarded as common law states. See Political Science Quarterly, March, 1887.

system began to be known as *equity*. It was customary for a person who felt that he had been wronged and could obtain no remedy at law, to petition the king, and at a later period the king's chancellor, for relief. The granting of this relief was at first considered an executive act and purely a matter of grace, but gradually the chancery evolved into a regular court with its own body of equity principles, which were much more flexible and far less technical than the ordinary law. Equity, therefore, gave relief in cases where none could be had at law; and in many instances where the legal remedy was inadequate it accorded the relief that was really demanded by the plain justice of the situation.

For example, the only redress granted at law is money damages, but equity goes much farther and will command a person to do something which is for the benefit of the plaintiff. Thus, in some kinds of contracts, a court of equity will compel the party in default to perform his part of the agreement. Again, equity will command a person, by an order called an "injunction," to refrain from doing something which is injurious and unjust to the plaintiff.

The English systems of law and equity were transplanted to America. When the colonies cast off their allegiance to Great Britain, some of the state constitutions specifically provided that the common law should continue in force; but without such a provision, the common law continued to be applied in the American courts and is to-day applied in so far as it has not been modified by legislation. Very few commonwealths, however, have retained the system of separate chancery courts.[1] Generally the same court administers both law and equity, sitting with a jury for the trial of cases at law and without one for the disposition of equity causes; and the term "common law" has come to include both law in its technical sense and equity.

Although the common law as administered in the various states constitutes a single system of jurisprudence, yet it has undergone modification in the different jurisdictions. Thus, for instance, on many points the "common law" of Massachusetts and New York will be found to differ. In each state the interpretation which is binding is made by its court of last resort; and as different courts will hold varying views on what is or ought to be the

[1] New Jersey, Tennessee, Alabama, Delaware, and Mississippi.

law on a particular topic, the rules applied in different commonwealths will vary. But the courts of each state by no means disregard the decisions of sister states. Although the latter are not considered as authoritative as the precedents of the state in which the case is tried, they are looked to as advisory statements of the law and have a great moral weight, particularly in matters in which the point in question has not been passed on in that jurisdiction.

II. The second important source of the law is the statutes enacted by the state legislatures.[1] Though the number of acts passed by the various legislative bodies is enormous, the great majority of them, probably as much as nine-tenths, are purely administrative in character. They relate to the structure and functions of the government, — elections, powers of officers, etc., — and do not generally affect private law, which is left almost entirely to judicial tribunals.[2] There are a few branches of private law, however, which it is customary to regulate by statute. These include principally matters which affect the public at large as well as a single individual. Thus the rules controlling marriage and divorce, wills and succession to property, the formation of corporations, are ordinarily found in legislative enactments.

During the last fifty years, moreover, several fields of the common law have been covered by statute.

(1) One of these is criminal law. In many states there is a penal code or penal law defining the various crimes and providing punishments for each of them. It is generally declared in such cases that only acts prescribed as crimes in the code shall be penalized, and the common law of crimes is abolished, except in so far as it is used as a guide for the interpretation of the statute.

(2) Criminal procedure is another subject that is commonly covered by statutory enactment, and special codes or laws regulating in detail such procedure now exist in a large number of the states.

(3) A third very important field now frequently occupied by statute is civil procedure. The technical and cumbersome system of common law pleading has been simplified and modified by

[1] In the broadest sense, state and federal constitutions, executive orders, etc., are to be included among the sources of the law.

[2] On codification, however, see below, p. 556.

legislative enactment. New York was the pioneer in this reform. It adopted a code of civil procedure about fifty years ago, and many other states have since followed this example.

(4) Another form of encroachment on the common law is to be found in the codification of the common law on some particular topic and its enactment into statute. Thus in New York — one of the states which has gone far in this direction — we find a real property law, general business law, lien law, etc. This tendency toward codification has been expedited by the national conference on uniform state laws consisting of commissioners appointed by the governors of various states. It has codified the law on many subjects, particularly those relative to commerce, and has recommended its proposals to the state legislatures for adoption. The most important act drawn up by the commissioners is the negotiable instruments law, which has been enacted by a majority of the states. It has also prepared a sales of goods act, a warehouse receipts act, a bill of lading act, etc., all of which have been adopted by one or more of the commonwealths.

(5) Finally, some states have taken a still further step, which many persons regard as undesirable, and attempted to codify *the entire civil law*. Louisiana adopted a civil code soon after its annexation by the United States. California, North Dakota, South Dakota, and some other states in the West and South have adopted codes which purport to include all the principal rules of the common law. In those commonwealths the code, instead of previous decisions, has to be examined in order to find the rule that governs a particular case. But even there, the common law has to be considered as supplementary to the code, as no code commission, no matter how wise, can possibly foresee every possible set of circumstances that can arise or decide in advance every question of law that may come up.

Most lawyers consider the codification of the whole common law an undesirable consummation of the movement toward the increase of legislation. In the first place, they contend that a civil code fails to accomplish the only purpose for which it is enacted; namely, to make the law more definite and certain. It is conceded that no code can provide for all possible contingencies and, therefore, its rules have to be made sufficiently general and elastic to allow their application to novel cases. Quite as much litigation arises over the interpretation of the code, as

arises in other states over the question as to what is or ought to be the common law rule on a particular subject.

In addition, the opponents of the system urge that a civil code involves a number of positive disadvantages. In the first place, it increases the diversity of the law among the various states. While the development of private law is in the hands of the courts, the tribunals of one state are always guided to some extent by the precedents of other commonwealths, and at times they modify their views so as to accord with the general weight of authority, thus working toward a desirable uniformity in the law throughout the United States. But the moment that the law is codified, the diversities among the states are crystallized and tend to become greater by subsequent legislative amendment.

The greatest objection, however, brought up against codification is the fact that it puts an end to the flexibility of the law. Where the common law is not codified, the courts, by distinguishing new cases and at times by overruling former precedents, may adapt the law to new conditions and keep it more or less up to the needs of the community. But as soon as the law is codified, this power of the courts is taken away from them and the rules of law can only be modified by legislative action, which leads to constant tinkering and uncertainty.

The Civil Law

The whole domain of the law falls into two divisions — civil and criminal. The purpose of the latter — to use legal terminology — is to punish and prevent public wrongs, while that of the former is to protect the rights of the individual and to redress his wrongs. The rights of the individual can be classified under three heads: the right of personal security, the right of personal liberty, and the right of private property. The last is the most complicated of the three and to it we must devote some attention.

(1) Real Property. — Property is divided into two classes, real and personal. Real property consists, in general, of land and rights connected with land, while the personalty includes all movable things and rights not connected with land. Real property is again subdivided into corporeal, or tangible, and incorporeal, or intangible. The former is land and buildings, while

the latter includes all the rights which a person may have in the land of another, such as the right of way over his neighbor's farm, the right to pasture cattle in another's meadow, etc.

According to legal theory, land is not owned absolutely. The so-called owner has an interest or an "estate" in the land. These "estates" are of various kinds. The highest estate that one can have in land is an estate in fee simple, which virtually amounts to absolute ownership, and the person who has such an estate in a plot of land is ordinarily regarded as the owner. He may use it for any purpose that does not violate another's right, and dispose of it in almost any way that he chooses. Next to the estate in fee simple comes the estate for life. The person who owns land in fee simple may convey it to another to hold during life. The latter thus gets a "life estate." Then there are life estates which arise by operation of law; in most states a husband has a life estate, which is called curtesy, in his wife's real property, after she dies. In the same way, if the husband die first, the wife has a life estate, or dower, in one-third of all the real property owned by the husband during their married life.[1]

(2) Personal Property. — Personal property is divided into four classes. Leases of lands or buildings are personal property and constitute the first class; they are known as chattels real. The second group includes everything which is ordinarily known as personal property; that is, tangible things, such as watches, pianos, clothing, etc. The third group consists of rights which do not extend over any tangible things, either immovable or movable, but are directed against particular persons or corporations, such as claims against debtors, notes, stocks, bonds, etc.; they are called in law "choses in action." The fourth group consists of trade-marks, copyrights, etc..

(3) Torts. — The violations of private rights recognized by

[1] Estates in fee simple and estates for life are called "freehold estates," all others being named estates less than freehold. The most important one in the latter category is the estate for years. A person who leases land or a building from another for a period longer than one year is said to have an estate for years. Estates can be created to commence in the future. For instance, a person may grant an estate for life, at the same time specifying that when the life tenant dies a certain person shall get the estate in fee simple. Estates may also be made conditional. To illustrate, a person may leave all his real property to his widow for life, provided she remains unmarried. Then if she should marry, she generally loses the estate.

law are called "torts." [1] A person guilty of a tort may be sued for damages by the person whom he injures. For convenience, we may subdivide torts into three classes: those directed against the person, those aimed at property, and those which are invasions of both person and property.

(*a*) False imprisonment — one of the torts in the first class — consists in arresting or detaining a person without sufficient cause. Somewhat akin to false imprisonment is malicious prosecution. A person who maliciously and without probable cause institutes proceedings against another is guilty of this tort, provided the original action has terminated in favor of the injured party. Another tort directed against the person is assault and battery.[2] All the various forms of disturbance of family relations are torts, such as abduction of the wife or child, adultery, alienation of affection, etc. Finally, there is the tort of defamation of character. It occurs in two forms: libel, which is expressed in print or writing; and slander, or oral defamation.

(*b*) Of the torts directed against property, the most important one is trespass or disturbance of another in the possession of his property. This is found in two forms: trespass upon land, to constitute which mere unauthorized entry on another's land is sufficient; and trespass to goods, which consists in wrongfully taking or destroying personal property. Deceit is knowingly making a false statement to another on which the latter relies and is thus damaged.

(*c*) Some torts affect both person and property. The first of these is nuisance. In law any disturbance of another's reasonable use and enjoyment of his own property constitutes a nuisance. Thus the maintenance of smelting works which give out unpleasant odors, unreasonable ringing of church bells, noises which disturb sleep, and numberless other acts are called nuisances. Finally, there is the tort of negligence, which consists in the failure to perform the duty of care which one owes to others. Thus the reckless running of a railroad train which results in an accident, negligent driving in a city street, the collapse of a building due to defective construction, are all actionable torts.

Although a person may be guilty of a tort there are circum-

[1] Reference: Burdick, *Law of Torts*.

[2] Putting another in fear of personal injury is an assault, while inflicting violence upon him constitutes a battery.

stances under which no recovery is allowed against him. Thus if the injured party was himself guilty of negligence and his negligence was one of the causes that led to his injury, he cannot recover any damages. This "contributory negligence" on the part of the plaintiff is considered a complete defence. In many cases, the so-called "fellow-servant rule" prevents a recovery. For example, a master is liable for his servant's torts; but if one employee is injured by the carelessness of another employee, the one so injured cannot recover against the employer, on the ground that they were "fellow-servants" and are presumed to have assumed the risks of each other's negligence.[1]

(4) Contracts. — A large group of rights arises from agreements between individuals known as "contracts." To constitute a contract there must be an offer made by one party and an acceptance of the offer by the other. Thus if Smith says or writes to Jones, "I offer to sell you my house for $10,000," and Jones replies "I accept your offer," in legal terminology their minds have met and there is a contract between them. Smith is then bound to convey the house, and Jones to accept and pay for it. A contract, to be valid, must be made for a "consideration"; that is, each party must give up something. Thus in the illustration above, one promises to convey the house, while the other agrees to pay for it. A mere promise made by one party, with nothing received in exchange for it, is not binding. A contract need not always be expressed in so many words, but is often implied from the transaction. For instance, if one orders goods from a store, a promise to pay their reasonable value is implied.

In most instances, no formality is necessary to make a valid contract and an oral agreement is as binding as a written one.[2] There are a few classes of contracts, however, which must be proved by written evidence, before a court of law will enforce them. Among these are contracts for the sale of real estate, for the sale of goods worth more than a certain amount, contracts which are not to be performed within a year, and a few others.

There are several forms of contracts that are especially important. One of these is negotiable instruments, such as prom-

[1] This rule is expressly abolished in some states with regard to certain employments. See below, p. 736.

[2] Contracts do not have to be made in person, but may be made through an agent.

issory notes, drafts, checks, etc. Negotiable instruments have one peculiar characteristic. A person may obtain such an instrument from another by fraud and therefore may not be able to sue on it, but if he transfers it for value to another, who does not know of the fraud, the latter can enforce it. This rule originated in commercial law, and its purpose is to facilitate dealings among merchants and bankers. Another common form of contract is the contract for the sale of personal property. What are known as bailments are contracts that occur very frequently: they consist in the delivery of personal property to another for some particular and temporary purpose. When a person lends a book to a friend, gives his watch to a watchmaker for repairs, pawns his jewelry, deposits his goods in a storage warehouse, or ships goods by freight or express, a contract of bailment is consummated. Still another large class of contracts is seen in policies of insurance, — life, fire, marine, accident, etc.

If one of the parties to a contract fails to perform his obligation, the other may sue him and get such damages as were caused by the breach. But in some cases the injured party may do much more. He may bring a suit in equity, and the court of equity will order the other party to carry out his contract. Such relief, which is known as "specific performance" is limited, however, to certain classes of contracts, the principal one of which consists of agreements for the sale of real estate.

(5) Domestic Relations. — One of the important branches of the law deals with marriage and all the relations growing out of it. At common law no particular formality was necessary to constitute a valid marriage. An agreement to live as husband and wife was sufficient. This rule is now generally modified by requiring a formal solemnization of all marriages. But no marriage may be consummated anywhere between close relatives or by persons below a certain age, and any marriage induced by fraud or duress may be declared void at the instance of the injured party. Mental or physical incapacity is also a ground for annulment of marriage.

At common law, all personal property belonging to a woman becomes the property of the husband on her marriage; the husband is obliged to support his wife, and for this reason he is liable for all necessaries furnished to her, if he fails to provide them himself; he is also liable for debts contracted by his wife

previous to their marriage; a married woman is incapable of making a binding contract, unless her husband has abandoned her; the husband may be sued for any torts committed by his wife, and at the same time he may recover for any injury done to her. All these common law rules, however, have been modified to a greater or less degree throughout the United States[1] and in the most advanced commonwealths married women now have substantially the same property rights as men.[2]

In every state except one, South Carolina, the marriage tie may be dissolved by an absolute divorce. In certain cases where a sufficient cause for an absolute divorce does not exist, a limited divorce or a separation may be granted. The grounds on which an absolute divorce is allowed vary greatly in the different states, the rule being very strict in some commonwealths, and very liberal in others. In New York, the only ground on which a divorce is granted is adultery, but in some states mere incompatibility of temper or abandonment for a period is sufficient.[3] In some western states divorces are so easily obtained that persons from all over the country desirous of dissolving their marriages acquire a residence in one of them and bring proceedings there. Such divorces, however, are not always recognized in the state in which the parties really live. There now is a strong agitation on foot to secure a uniformity in the laws of the different states relating to marriage and divorce; but it is carried on principally by the opponents of liberal divorce, and has awakened a powerful opposition among those who contend that the old system (which absolutely bound the wife to the husband) is a relic of slavery.

(6) Inheritance.—A branch of the law that is somewhat akin to domestic relations is the one dealing with the distribution of a person's property after his death. It provides how one's real and personal property shall be distributed if he dies intestate; that is, without having made a valid will. The rules of succession vary greatly in the different states. Often there are separate rules for the disposition of real and personal property. Where a

[1] See above, p. 95.

[2] The law also makes provision for regulating the relations between parent and child.

[3] In South Dakota the chief grounds are cruelty, desertion for one year neglect for one year, habitual drunkenness, adultery, and felony.

person has left a will, the law provides for its enforcement and the disposition of the property in accordance with its terms. Usually a person names an executor in his will, who is to take charge of the property and distribute it to the legatees. In cases in which there is no will, or no executor is named, the court may appoint an administrator, who takes charge of the property and distributes it in accordance with law or in accordance with the will.

(7) Corporations and Associations. — Finally, the law governs the various forms of associations between individuals and regulates the rights and liabilities of the members. The principal forms which these associations take are partnerships and corporations, between which there are several important distinctions. A partnership can continue in existence only so long as the partners are living, but a corporation is permanent and is not in the least degree dependent upon the lives of its original members. Partnership action in important matters may require unanimity; in corporations, the will of a majority prevails. Every member of a firm is generally liable for all the partnership debts, while a stockholder of a corporation is usually responsible for no more than the par value of his stock. Finally, an interest in a partnership cannot be transferred without the consent of the other partners, while shares in a stock company may be conveyed at will.

Civil Procedure

If a person wishes to enforce some right, which he thinks has been violated, he must bring an action in a court. A suit is usually commenced by the plaintiff's making out a statement, called the complaint or declaration, of the facts on which the grievance is based, which is served on the defendant, together with a summons calling upon him to answer within a certain time. If the defendant admits the facts but believes that the plaintiff has no right of action, he may file what is called a "demurrer." An argument is then had before a judge on the question as to whether, granting the facts alleged in the complaint to be true, a sufficient cause of action has been set out. The other alternative which the defendant has is to take up the question of fact. He must then serve on the plaintiff what is called an

answer, or plea, either denying the whole or a portion of the complaint, or else acknowledging its truth and setting out some affirmative defence. The plaintiff again has his choice of demurring to its sufficiency or replying to the facts.

In states where the original common law procedure prevails, this interchange of pleadings, as these various statements are called, can go on indefinitely until an issue is reached, one of the parties affirming some fact and the other denying it. The various codes of civil procedure frequently limit the number of steps to two — the plaintiff's complaint and the defendant's answer; but sometimes also allow the plaintiff to reply to the answer.

As soon as its turn is reached the case comes up for trial. If it is a suit in equity, it is tried by a judge alone. If it is a suit at law, it is generally tried before a judge and a jury, unless a jury trial is waived by agreement of the opposing sides. In a jury trial, the duty of the judge ordinarily is to regulate the conduct of the trial and to pass on all matters of law, while the function of the jury is to decide questions of fact under the guidance of the judge.[1]

If the case is to be tried by a jury, a number of jurors are summoned; these are examined by the opposing counsel; and if it is shown that any one is legally exempt or incompetent to serve because of bias or otherwise, the judge may excuse him. Besides this, each side may challenge a certain number of jurors without stating any cause.

When the jury has been procured, the actual trial is ready to start. Usually the plaintiff's counsel opens by describing the nature of the case to the jury and stating the main facts which he expects to prove. He then calls his witnesses and examines them one by one, the defendant's attorney being given an opportunity to cross-examine at the close of the direct examination of each witness. The questions that may be asked are strictly regulated by complicated rules of evidence, and an error on the part of the judge in the admission of improper evidence or the exclusion of competent testimony is ground for reversal of the judgment on appeal to a higher court.

[1] Taft, *Four Aspects of Civic Duty*, pp. 37 ff.; see *Readings*, p. 490, on this important point of the relation of the judge to the jury.

After the plaintiff's side of the case has been laid down, the defendant's side is presented in the same manner. His attorney makes a statement to the jury and then examines his witnesses, the counsel for the plaintiff being allowed to cross-examine. The plaintiff and defendant may be witnesses if they wish After the defendant rests, the plaintiff may introduce evidence in rebuttal, and then the defendant may bring forth testimony in surrebuttal. At the close of the evidence the attorneys for the opposing sides may address the jury.

If the plaintiff has failed to make out a prima facie case, the judge may dismiss the complaint without sending the case to the jury. Or if from the evidence that has been presented only one conclusion of fact is possible, the judge may direct the jury to return a verdict in accordance with that conclusion. If, under such circumstances, a verdict for the plaintiff is directed, the only question to be decided by the jury is the amount of damages or the award. But if there are controverted questions of fact, as is usually the case, decision with regard to them is left to the jury. The judge makes a charge to the jury in which he ordinarily instructs them as to the law applicable to the case.[1]

The jury then retire to decide upon a verdict. They must find a verdict either for the plaintiff or defendant, or agree to disagree; and if they decide for the plaintiff, they must also assess the damages. The verdict in most states must be unanimous, and if the jury is unable to agree, the case must be retried with another jury.[2]

If the case is tried without a jury, the procedure is practically the same, except that the judge passes upon all questions himself. Where the case is complicated, it is often customary to send it to a master or a referee to take testimony and to make a tentative finding. The judge then goes over the record of the testimony and the report of the master or referee, and makes a final decision.

The usual remedy that a person gets at law is money damages. A judgment for the amount of the verdict is entered against the defendant. If he does not pay voluntarily, an "execution," or an order to the sheriff, may be issued. Armed with the execution, the sheriff or one of his deputies takes possession of the

[1] *Readings*, p. 491.

[2] Unanimous verdict is not required in all cases in all states. *Readings*, p. 88.

defendant's property and sells enough at auction to pay the amount of the judgment to the plaintiff and his own charges. Of course, if the defendant should be a man without property, the plaintiff has no redress. In litigation over title to real estate, however, the usual judgment is that the plaintiff enter upon the premises. If the defendant then resists the plaintiff, he may be evicted by force by the sheriff.

In equity cases the decision of the court is called the decree. It does not ordinarily award money damages, but orders the defendant to do or not to do something. The decree may, for instance, command him to carry out his part of a contract and convey to the plaintiff land which he agreed to sell to him, or it may enjoin him from maintaining a nuisance, such as using soft coal in his furnace. In fact, a decree in equity may take on any one of innumerable forms, but it always is in essence a command to do, or an order not to do, something. If the defendant fails to obey the decree, he is guilty of a contempt of court, and may be fined or imprisoned until he complies with the order.

After the case is decided, the losing party may appeal: (*a*) because of errors of law committed by the judge or (*b*) on the ground that the verdict was contrary to the weight of evidence. The side that loses on the appeal may sometimes carry the matter still higher, until the case finally reaches the highest court of the state or of the nation.[1] The highest court usually passes only on questions of law.[2]

If the highest court which the case can reach affirms the judgment of the trial court, that ends the litigation. But if the judgment is reversed, the case is usually sent back for a new trial.[3] Then the party that loses on the second trial may again compel his adversary to run the gauntlet of the appellate courts because of alleged errors committed in this trial. If the judg-

[1] For the conditions of appeal to federal courts, see above, chap xv.

[2] The appellate courts always consist of several judges, and the opinion in each case is written by one of them. The opinions of the highest court of each state, and sometimes those of some of the inferior courts, are published and become precedents for future decisions. If one or more of the judges disagree from the opinion of the majority of the court, a dissenting opinion may be handed down. In most states there are special reporters, whose duty consists in publishing the official reports of the decisions of the court.

[3] See below, p. 567.

ment is again reversed, a third trial must be had and the same process may be repeated. If the party that loses at each stage desires to appeal, there is no way of ending the litigation until some judgment of the trial court is affirmed on appeal.

In some instances this freedom of appeal results in a practical denial of justice. Thus there is one case on record in New York which was in the courts for twenty years. In 1882 a brakeman who was injured while in the service of a railroad brought suit against the company.[1] In 1884 he recovered $4000 damages, but two years later the verdict was reversed on appeal. On a new trial he got a verdict for $4900. This was appealed to two courts successively. The first affirmed and the second reversed the judgment. The company was successful at the third trial in 1889. Two appeals by the brakeman followed, the court of last resort deciding in his favor in 1897. The case was then tried for a fourth time, and the brakeman recovered $4500. The company then appealed and met with success. A fifth trial was necessary, and the jury awarded the plaintiff $4900 damages. The judgment was again set aside on appeal. A sixth trial followed with the same result. In 1902 the seventh and last trial took place. The plaintiff recovered $4500. The company again appealed, but was unsuccessful. This finally put an end to the litigation.

This is, of course, an extreme case and similar cases are rarely found in our legal history. Appeals are generally taken only when the counsel in the case feels that there is a fair chance of success or of wearing out the opposing party. A majority of appeals are unsuccessful, and it is only a small minority of cases that have to be tried more than once.

Nevertheless, the freedom of appeal and the consequent law's delay have been made the subject of severe criticism.[2] Delays in civil cases are far more frequent than in criminal cases, and, as has been truthfully remarked, often amount to a denial of justice. But, on the other hand, it is hardly practicable to restrict the freedom of appeals without making arbitrary rules that would be bound to work injustice at times. To allow appeals only in controversies involving large amounts would be

[1] Baldwin, *The American Judiciary*, pp. 366–367.
[2] *Readings*, p. 500.

undemocratic and give unjust privileges to wealthy litigants. Moreover, cases that are of comparatively trifling pecuniary value sometimes involve legal principles of great importance that should be passed upon by the higher courts.

It has been suggested that appeals should not be made a matter of right, as they are to-day, and that no appeal should be allowed unless permission is granted by the trial judge or by the appellate court. However, it is pointed out that such a system would be likely to result frequently in a denial of the right of appeal in cases in which injustice had been done and should be righted by a higher tribunal.

Generally, when an appellate court reverses a judgment, it has the power to enter a final judgment for the other party. This power is rarely exercised, however, and the case is usually sent back for a new trial. In some instances, a new trial is inevitable, as when the proof of essential facts has been shut out at the trial or damages have been assessed on an improper basis. But very often the appellate court has sufficient data on the record before it to make a final disposition of the case. If this were done whenever it is possible, one of the largest sources of delays would be abolished without any revolution in our legal system.

Criminal Law[1]

We have briefly surveyed the principal wrongs against which the state protects the individual, and have examined the methods for redressing them. We must now consider another class of wrongs — public wrongs, or wrongs against the state or community. Wrongful acts included within this class are known as "crimes," and are punished by the state. While in most cases these acts primarily harm some person, they are also regarded as injuring the state, because the state has an interest in the safety of the lives and property of its citizens.

Inasmuch as a criminal act may at the same time contain the elements of a civil injury, a person guilty of a crime may lay himself open to a suit for damages as well as to punishment. Thus if one person assaults another, he may be prosecuted by the state as a criminal and also sued for damages by the injured party.

[1] Reference : May, *Criminal Law.*

All crimes are divided into two classes; felonies and misdemeanors. The former includes all graver offences, generally those punished by death or by confinement in a state's prison. All lesser offences constitute the second class. They are ordinarily punished by fines or imprisonment in a penitentiary or county jail for comparatively short terms.[1]

The principal felonies are murder, manslaughter, arson, burglary, robbery, and larceny. Murder is the intentional, and manslaughter the unintentional, killing of a human being. In some states murder is divided into degrees according as it is premeditated or unpremeditated. Manslaughter may take any number of forms and sometimes is also divided into degrees. Thus if a person dies as a result of a blow which was not intended to cause death, or if he is run over and killed by an automobile because of the negligent driving of the chauffeur, or if he meets his death in a railroad wreck brought about by the failure of the proper employee of the company to give the required signals or set the switch, the act in each case constitutes manslaughter. Intentional killing in a sudden heat of passion caused by adequate provocation is also generally regarded as manslaughter and not murder.

Arson is wilful and malicious burning of a dwelling-house. Any incendiarism, however slight, is sufficient to constitute the crime. Burglary consists in breaking and entering into the house of another with the express intention of committing some felony therein. It makes no difference whether the person actually commits some crime within the building: the breaking and entering is itself burglary. Robbery is taking another's property from his person or in his presence by force. Picking a man's pocket so that he is not aware of what is being done is not robbery, but larceny; but taking money from a person at the point of a pistol, or knocking him down and then stealing something from him, is punishable as robbery. Larceny is stealing the personal property of another. All the various forms of theft and swindling are larceny, and it is often divided into grand and petty larceny, according to the amount stolen, the former being a felony and the latter a misdemeanor.

In addition to the felonies enumerated above, many other

[1] Conviction of a felony very often carries with it the loss of the right to vote.

offences are often made felonies. Forgery is generally a felony. It consists in making or altering a written instrument to defraud another. Thus, writing another's signature on a check or changing the amount called for constitutes forgery. Somewhat akin to forgery is the crime of counterfeiting or making false money, which is punishable by the federal government. Kidnapping is usually made a felony. Bigamy, which consists in having more than one wife or husband at the same time, is a felony. So is also the offence of perjury or the wilful giving of false testimony while testifying under oath in a judicial proceeding.

Other offences are misdemeanors. They vary greatly in enormity and many of them differ in the several states. Mayhem, though a felony in some states, is generally a misdemeanor. It consists in violently depriving another of the use of any of his members or often of any permanent physical disfigurement inflicted by force. Bribery is also a misdemeanor, though at times it is made a felony. So is knowingly receiving stolen goods. Malicious libel, which consists in defaming another in print or writing, is a crime and is punished as a misdemeanor. Assault and battery, disturbance of the peace, violations of the pure food laws, the use of false weights and measures, spitting on the floor of a street car or other public conveyances, and other miscellaneous offences, are misdemeanors. In fact, the whole mass of minor offences is included in this group.

It is not alone for offences actually committed that punishment is inflicted. It often happens that a person conceives the design of committing a certain crime and takes some steps toward carrying out his purpose, but is, for some reason, prevented from effecting it. In that case he is punished for the attempt to commit the crime. Of course, a less punishment is inflicted for an unsuccessful attempt than for the crime itself. Thus a person intending to kill another might shoot at him, but miss his aim; he is then guilty of an attempt to commit murder.

Not only the principals who actually commit a crime are punishable for it; their accomplices are liable as well.[1] Accomplices are of two classes: accessories before the fact and accessories after the fact. The former category includes any one who in any way advises, encourages, or assists in the prepara-

[1] *Readings*, p. 449.

tion for the crime which is afterward committed. In some states, accessories before the fact are put in the same group with principals and are punished as such. An accessory after the fact is one who assists in the escape of the offender after the crime has been committed, or helps to cover up the crime.

To be convicted of a crime, a person must have a criminal intent. This is ordinarily presumed. But a small child cannot have such an intent and his acts do not constitute crimes. An insane person is also not responsible for his acts. But legal tests of insanity are much stricter than medical tests, and often persons considered lunatics by medical men are held to be sane in law. An intoxicated person is responsible for his crimes, voluntary drunkenness being no excuse.

Criminal Procedure

While civil actions are brought by the injured party, criminal prosecutions are conducted by a prosecuting officer in the name of the state. A criminal proceeding ordinarily begins with the arrest of the offender. The arrest may be either by warrant or not. A police officer or a private individual may make a complaint before a magistrate who will thereupon issue a warrant or order of arrest against the person so accused. But in many cases an arrest may be made without a warrant, particularly when the crime is committed in view of the person who apprehends the criminal, or when the officer making the arrest knows that a felony has been committed and has reasonable grounds for believing that the one whom he is taking into custody committed the offence. The exact rules defining the cases in which an arrest may be made without a warrant vary in the several states.

After a person is arrested, he is brought before a magistrate[1] as soon as possible. The proper official examines the case and hears whatever evidence may be produced; but neither at this examination nor at any subsequent stage of the proceedings may the accused person be questioned, unless he himself desires to testify. This is one of the cardinal principles of the English and American criminal procedure and is one of the main distinctions between the Anglo-American system and that in vogue on the

[1] For the writ of habeas corpus, see above, p. 302.

continent of Europe where the accused may be and usually is interrogated.[1]

If the magistrate before whom the prisoner is arraigned finds that there is probable cause for holding him for trial, he commits him to jail until further proceedings are had, at the same time allowing him to give bail if he so desires, unless the accusation is one of murder. By giving bail is meant that one or two individuals, called sureties, sign a bond obligating himself or themselves to pay a certain sum of money to the state or county if the accused person fails to appear when his case is called for trial.[2] If bail is given, the person is released.

The case (unless it is a petty offence) is now ready to enter upon the next stage of the proceedings, namely, indictment by the grand jury, before whom the matter is presented by the prosecuting attorney. The grand jury is one of the oldest institutions of the common law and for a long time it was cherished as a safeguard against needless and oppressive prosecutions. It is a body of men drawn at the beginning of each term of court from qualified inhabitants of the county. It passes on all accusations, and if it decides that there is sufficient evidence which, if unrebutted, will probably convict the accused, it finds an "indictment" against him and the case will then go to trial. If the grand jury determines that the evidence is insufficient, the charge is dismissed and the prisoner is released from jail or his bondsmen are discharged, as the case may be.

The proceedings of the grand jury are secret and it hears only one side of the case, — the prosecution. The evidence is generally presented by the prosecuting attorney, who also prepares the bill of indictment, and if the grand jury decides to indict, it indorses the fact on the bill. The decision of the grand jury need not be unanimous, as is the case with petty or trial juries, but a majority vote of the whole body is sufficient. The grand jury is not limited to passing on matters presented to it by the prosecuting attorney, but may undertake investigations of its own. It does not often do so, however. While cases usually begin with the arrest of the accused, it frequently

[1] These principles are now often most grossly violated in the United States by the "third degree" practice of "sweating" prisoners.

[2] The amount of the bond varies with the enormity of the offence and the probability of escape.

happens that an accusation is presented first before a grand jury, and in that event, of course, there is no preliminary examination before a magistrate.

In some states indictment by grand jury, even in serious crimes, is not necessary to bring a person to trial, but the same result is accomplished by "information" [1]; that is, by an accusation brought by the prosecuting attorney. This procedure gives more influence to the prosecuting attorney, as he then has the sole power to determine whether a case should be brought to trial or not. Prosecution by information is, however, generally employed for minor offences.

After a person is indicted, he is brought before the court, the charge is read to him, and he is directed to plead. If he pleads guilty, no further proceedings are had,[2] and the judge imposes sentence either at once or at some later date. If he pleads not guilty, a trial is accorded to him. When the date set for the trial arrives, the cause is called before the judge holding the court. The first step consists in impanelling a jury of twelve men. The various jurors summoned are examined in turn by the prosecuting attorney and the defendant's counsel, until finally the jury is selected. The process is at times a long one, particularly in important and sensational cases. Any juror who states that he has formed a definite opinion about the case is incompetent to serve, and this rule excludes a good many men in a case which has attracted much attention and has been discussed by newspapers. In addition to this, each side may challenge a certain number of jurors peremptorily without giving any reason.[3]

After a jury is thus selected, the prosecuting attorney opens his case, inasmuch as the defendant is presumed to be innocent and the burden is on the prosecution to prove him guilty. In his opening speech, he generally describes the circumstances under which the alleged crime was committed and states by what evi-

[1] *Readings*, p. 88.

[2] A man cannot plead guilty of murder in the first degree, however, for some form of trial must be employed in such a serious case.

[3] The old process of selecting jurymen has been severely criticised within recent years on account of the great expense and waste of time. In the Gilhooly case in Chicago it took three months to secure a jury and the costs of that process to Cook county are estimated at $18,000.

dence he expects to prove the guilt of the prisoner. The prosecuting attorney then summons his witnesses one by one, and examines them about the facts of the case. As he finishes with each witness the defendant's attorney may cross-examine.

The questions that may be asked of the witnesses are limited by rules of evidence, so that no irrelevant matter may be brought in, and the witness may be confined to testimony about the facts with which he is personally acquainted. The purpose of these rules is to prevent the jury from being misled or prejudiced by facts that are not closely connected with the case. If either lawyer believes that the other is asking an improper question, he may object, and the judge then decides whether the question should be allowed or not. If the lawyer against whom the court rules is dissatisfied, he takes an "exception."

After the prosecution completes the presentation of its side of the case, the attorney for the prisoner presents the other side in about the same manner. He first makes an opening statement to the jury, and then calls and examines his witnesses, one by one, the prosecuting attorney being given a chance to cross-examine as soon as each direct examination is finished. The prisoner is not questioned at any stage of the trial unless he wishes to go on the stand as a witness in his own behalf, and in that event, the prosecuting attorney may cross-examine him in the same way as all the other witnesses for the defence.

After the taking of testimony is ended, the prosecuting and defending counsel make speeches to the jury; and upon their completion, the judge delivers his charge. He sums up the evidence brought out by each side, and states to the jurors what is the law applying to the case before them. Thus, he tells them what must be shown in order to constitute the crime with which the defendant is charged, describes the different degrees of that crime (if the particular offence happens to be divisible into degrees), and states how much proof is necessary. The jury must feel convinced beyond a reasonable doubt that the defendant is guilty in order to convict; otherwise it must find a verdict of not guilty.

When the judge finishes his charge,[1] the jurors retire to deliberate. They must, as a rule, arrive at a unanimous verdict, and

[1] If either lawyer is dissatisfied with any part of the charge he again "excepts."

often that takes many hours.[1] If they are absolutely unable to agree, they are discharged, and the prisoner has to be tried again. When the jury comes to an agreement, it returns to the courtroom and the foreman announces its verdict — guilty or not guilty. If the defendant is found not guilty, he is discharged at once. If he is convicted, the judge imposes sentence either immediately or at some future date.

The punishment for most crimes is imprisonment. For minor offences a fine is often imposed, and sometimes the sentence consists of a combination of both. The term of imprisonment varies from a short confinement in the county jail or penitentiary to imprisonment at hard labor in a state's prison for life. The law generally lays down minimum and maximum limits of punishment for the various offences, and the trial judge has full discretion in imposing any punishment within those limits. In some southern states convicts are compelled to work in the open air in chain-gangs. At times they have been turned over to private employers to work for wages paid to the state; but this system has given rise to great cruelty and is being abolished because it is revolting to an enlightened public opinion.

For good behavior the prisoner usually receives a substantial reduction in the term of his sentence, and it often happens that he is pardoned by the governor before his term ends, if there are extenuating circumstances warranting mercy.[2] A new system of punishment known as the "indeterminate sentence" has been introduced in some states in recent years. Under this method the judge imposes a minimum and maximum term, and whether the prisoner is released at the close of the minimum term or is kept in prison longer, possibly until the expiration of the maximum term, depends on his behavior and on the promise of reform that his conduct shows. If he is liberated before the close of the maximum term, he is generally kept on probation for a while and is obliged to report to the prison officials at stated intervals, or to special probation officers.

For murder the death penalty is inflicted in most states, and in a few commonwealths it is also imposed for some other crimes.

[1] In a few states in the West a verdict by nine or ten out of the twelve jurors is allowed in some cases; *Readings*, p. 88.

[2] For an excellent illustration, see *Readings*, p. 448; on the pardoning power, above, p. 498.

Execution is generally carried out by hanging, but in a small number of commonwealths electrocution has been substituted for hanging, as a more humane and less painful method of putting to death. There are a few states — Maine, Michigan, Wisconsin, Rhode Island, and Kansas — in which capital punishment has been entirely abolished. Opponents of the death penalty claim that the fear of death does not diminish the percentage of crimes, and that juries are reluctant to convict where they know that the penalty will be death, often convicting of a less degree so that the prisoner may be punished by imprisonment. Although cases in which innocent persons are, by a miscarriage of justice, put to death are exceedingly rare, still a few are on record, and a mistake may be made at any time on account of the circumstantial character of the evidence frequently admitted. Finally, the reformation of the offender, as well as the protection of society — not retaliation — is the end of enlightened punitive justice, and the death penalty is altogether inconsistent with such a humane notion.

When the prisoner has been found guilty and sentenced, his resources are not yet at an end. He may appeal to a higher tribunal if any mistakes have been made by the trial judge. Any alleged error in the admission or exclusion of evidence or any incorrect statement of the law applicable to the case made in the judge's charge, is ground for reversal. If the appeal is decided against the prisoner, he may, in some instances, carry the case still higher, until finally it is passed upon by the highest court of the state or by the Supreme Court of the United States, if a federal question is involved. If he wins on the appeal, a new trial is usually granted, and the case is sent back for a rehearing to the court in which it was originally tried. If he loses his appeal, the defendant must acquiesce in the sentence, unless the governor can be persuaded to pardon him.

A great deal of criticism has been evoked against the liberality of the system of appeals in criminal as well as civil procedure and the consequent failure of justice. While it cannot be denied that verdicts are too frequently reversed for purely technical reasons, which could not have possibly injured the defendant, the evil is not as extensive as it is often supposed to be. Thus in New York County, during the five years from 1898 to 1902 inclusive, about 11,000 persons were convicted of felonies, of whom less

than nine in a thousand took an appeal; of these, less than a third were successful.[1] But the cases that attract public notice because of their sensationalism are generally the ones in which delays incident to appeals occur. In a good many instances in which verdicts have been reversed, obvious injustice had been done to the appellant. This is particularly true where evidence offered in his defence has been wrongfully excluded by the trial judge, where the prosecution has failed to make out a prima facie case and show facts sufficient to constitute the offence, and where the trial judge has made a serious mistake in his charge to the jury. Nevertheless, in a considerable number of reversals, the errors are purely technical and do not involve at all principles of strict justice.

The remedy, however, does not consist in a narrow limitation of the system of appeals. If the prisoner has no absolute right to appeal, there will be cases of wrongs committed at the trial which will never be righted. But the appellate courts should adopt the practice of refusing to reverse a verdict if the errors complained of are not of such a nature as could have prejudiced the defendant in the eyes of the jury. Finally, a good many of the delays and technicalities of legal procedure will be avoided if at the trial the judge exercises a greater amount of control over the proceedings, as is done in England, and to a less extent in the federal courts.[2]

[1] Harvard Law Review, Vol. XVII.

[2] For a searching inquiry into the causes of injustice in our courts, especially to the poor, see R. H. Smith, *Justice and the Poor* (Carnegie Foundation for the Advancement of Teaching, 1919). A number of specific remedies are suggested.

CHAPTER XXVII

THE ORGANIZATION OF MUNICIPAL GOVERNMENT

Mr. Bryce, in his chapter on the working of American city governments, remarks that "there is no denying that the government of cities is the one conspicuous failure of the United States." If we accept this statement even without qualification, we must remember the special difficulties which are associated with municipal government in the United States. In the first place, our cities are of recent and rapid development, and are intimately involved with the remarkable and heedless advance of industry and commerce which accompanied the opening up of the country. When Washington was inaugurated, only about one-thirtieth of the population lived in cities of over 8000, and in a little more than a hundred years one-half of the inhabitants have become city dwellers.

It must be remembered, also, that a great portion of the city dwellers are collected from all the nationalities of the globe. The census of cities of 25,000 inhabitants and over, in 1900, showed that no less than 26 per cent were of foreign birth, to say nothing of those who were of immediate foreign descent. In New York City, the percentage of foreign-born was 37; in Chicago it was 34.6; in Lawrence, Massachusetts, 45.7; and in Woonsocket, Rhode Island, it reached 44.4.[1] To this alien group must be added the negroes, who, while numerically insignificant in many northern cities, constitute a large portion of most southern cities — 56.5 per cent in Charleston, South Carolina. To the cities have been attracted also large numbers of the shrewd and ambitious inhabitants of the country districts largely in pursuit of economic gain.

[1] In spite of these astounding figures it must also be noted that the percentage of aliens is really declining in our cities. See Goodnow, *Municipal Government*, pp. 25 ff.

Thus our cities are really vast conglomerations, composed of peoples of every nationality, and of the keenest and most enterprising natives; their populations are constantly shifting, besides being augmented by the inflow of foreigners. They are largely without civic traditions; their governments offer unparalleled opportunities for spoils and private gain to the politicians and sharp hunters of franchises and special privileges; and it is small wonder, therefore, that up to the present time the problem of American municipal government has not been solved to the satisfaction of any one.

The City and the State

Before taking up the study of the structure of municipal government in the United States, it is necessary to consider the position of the city as a local unit in the government of the state. The American city, in all except a very few commonwealths,[1] is largely subject to the state legislature, which creates its charter in the first place, establishes its form of government, fixes its powers, and from time to time imposes new institutions on top of those created under the charter. Thus the city lies completely at the mercy of the legislature, save where protected by constitutional provisions, and thus municipal affairs are drawn inevitably into the current of state politics. This situation has raised the vexatious question of municipal "home rule." [2]

It is urged by the champions of municipal home rule — practical autonomy for each city — that the state legislature is unfitted to exercise control over many questions which affect only urban dwellers because it does not have the requisite time to look into the details of city government or the requisite knowledge of the problems of such government, and does not feel the proper responsibility to urban constituencies. Owing to the constitutional discrimination against cities in favor of the rural districts,[3] the representatives of rural minorities are able to impose upon the cities laws and institutions wholly unsuited to urban conditions. In the next place, it is contended by the advocates of home rule that there are a number of purely city problems which cannot have any

[1] Below, p. 583.

[2] See Goodnow, *Municipal Home Rule*, and Deming, *The Government of American Cities*.

[3] Above, p. 520.

considerable interest for the people of the state at large. They say, for example, that the paving and lighting of the streets, the provision of means of transportation, the establishment of waterworks, the maintenance of markets, and many other similar matters, should be left entirely to the determination of the municipal voters.

To these contentions the reply is made that there are few, if any, purely municipal functions which have no general interest for the state at large.[1] If the city wishes to establish waterworks, it must go sometimes, as New York City has gone, a hundred miles or more into the country, and must, therefore, secure watersheds by a state concession. With the growth of the means of rapid communication, our city populations have spread far beyond the boundaries of municipalities, and the system of municipal transportation accordingly covers far more than the areas under city government. A notable example of this is New York City, which is really the urban centre for a vast area extending fifty miles or more in every direction. Owing to the large number of voters in the municipalities, the integrity of the whole state election may depend upon the effectiveness with which the municipal police uphold the election laws and secure an honest count. Finally, the tenements, industries, health, and progress of each city are inextricably woven with larger state and even national problems of the land, taxation, natural resources, labor legislation, and social control. Speaking generally, therefore, the state at large has a fundamental interest in the health and well-being of the city dwellers, and accordingly there is hardly a problem of municipal government that is not vitally connected with the larger problems of state government.

Indeed, Professor Goodnow has shown, by a survey of the historical development of cities, that the whole tendency of modern times is away from that autonomy enjoyed by cities in the Middle Ages. He points out that matters which were once of purely local interest have now become general; that in modern life commerce and industry have become state concerns; and that it is impossible to determine arbitrarily the point at which state interest ends and municipal interest begins. He cites the example of Massachusetts, where the competition of many cities for sources

[1] *Readings*, p. 509.

of water-supply became so keen that the state had to interfere and assume general control. He also shows that what may be a municipal function in one city may not be in another, citing, as an example of this, Chicago and New York—in the disposal of sewage Chicago uses one of the rivers which flows through the state, and thus the sewage question becomes a matter of state concern; while New York is differently situated in this regard, owing to the fact that it can discharge its sewage into the ocean. Professor Goodnow concludes: "Municipal home rule, unless those words are used in a very limited sense, has no just foundation in either history or theory until the conditions of city populations are very different from what they are at present. Municipal home rule without limitation is a shibboleth of days that are past. On account of the reverence in which it is held, it is often used by those who have not the true interests of urban populations at heart, or by those who, while possessing good intentions, perhaps are not sufficiently acquainted with the conditions to which they would apply it, and certainly do not consider the problem in the light of the history of western municipal development." [1]

It is clear, therefore, that the limits of municipal government cannot be fixed for any state or any city by a general rule of law; but it is also clear, in the light of great abuses which cities have suffered at the hands of our state legislatures, that some check must be placed upon the power of the legislature to control municipal affairs. Several plans have been devised to meet this difficult problem.

1. The constitutional convention of Pennsylvania, in 1873, sought to solve the problem by adopting the rule that the state legislature should not pass any local or special laws regulating the affairs of counties, cities, townships, wards, boroughs, or school districts; but this restriction was found to be entirely too narrow, and when the general assembly sought to legislate for the city of Philadelphia alone by passing a law which should apply to all cities having a population of at least 300,000, the court pronounced this action constitutional. The court held that it could not have been the intention of the framers of the constitution to bolt and rivet down, by fundamental law, the machinery of state government in such a way that it could not perform its necessary func-

[1] *Municipal Government*, p. 94.

tions. "If the classification of cities," said the court, "is in violation of the constitution, it follows of necessity that Philadelphia, as a city of the first class, must be denied the legislation necessary to its present prosperity and future development, or that the small inland cities must be burdened with legislation wholly unsuited to their needs. For if the constitution means what the complainants aver that it does, Philadelphia can have no legislation that is not common to all other cities of the state. . . . We have but to glance at this legislation [relating to quarantine, pilotage, trade, inspection, etc.] to see that most of it is wholly unsuited to small inland cities and that to inflict it upon them would be little short of a calamity. Must the city of Scranton, over a hundred miles from tide-water, with a stream hardly large enough to float a bateau, be subjected to quarantine regulations and have its lazaretto? Must the legislation for a great commercial and manufacturing city with a population of more than a million be regulated by the wants or necessities of an inland city of 10,000 inhabitants?"

2. Recognizing the necessity for putting limits to the power of the state legislature to control cities and at the same time recognizing the imperative necessity for special legislation, New York has sought to give the cities a voice in legislating upon the matters especially affecting them.[1] This has been done by a classification of the cities of the state into three groups according to their populations and by providing that special laws — that is, those relating to a single city or less than all the cities of a class — must be passed in conformity to the following principles: When any such special law is passed, it must be transmitted to the mayor of the city affected. In cities of the first class (of over 175,000 inhabitants) it must have the approval of the mayor, and in cities of the other two classes the approval of the mayor and city council, before it can become a law. If the bill is accepted by the proper municipal authority, it is transmitted to the governor of the state, who may veto it or approve it, as he sees fit. If the bill is not approved by the local authorities, it is transmitted to the branch of the legislature in which it originated, and may become a law if it is repassed (at that session) by the ordinary majority in both branches.

[1] See *Readings*, p. 512, on this important topic.

This constitutional provision is further elaborated by a statute which provides that when any such law is transmitted to a city, the authority which has the right of approval or rejection must hold a public hearing on the measure, after having given due notice by publication in newspapers. The design of this is to afford to the friends and opponents of the measure a right to state their reasons for its approval or rejection. This method, while it does not vest the right of final decision in the city, does guard against hasty legislation, assures publicity, and gives to the authorities of the city some weight in determining the course of state legislation. Nevertheless it does not cure the evils of special legislation.

3. A third method of controlling the state legislature was provided by the Missouri constitution of 1875, which gives each city having a population of more than 100,000 inhabitants the right to frame a charter for its own government consistent with and subject to the constitution and laws of the state. It stipulates that such a charter shall be drafted by a board of thirteen freeholders elected by the qualified voters of the city, then submitted to the approval of the voters, and go into effect on receiving four-sevenths of the votes cast at the general or special election at which it may be submitted. It is provided further that all such charters shall include in the plan of government a mayor and a council of two houses, one at least elected on a general ticket.[1]

This plan, with some modifications, has been adopted by California,[2] Oregon, Washington, Minnesota, Colorado, Oklahoma, and Michigan. "Probably this is the most effective method of protecting cities against legislative interference," says Professor Goodnow. "In their interpretation of these constitutional provisions, however, . . . the courts hold that the privilege of framing its own charter of local government does not affect the functions of government which, while discharged in the city, interest the state as a whole. A provision of this sort does not, therefore, prevent the state from interfering with the police force or the educational system of cities, since these branches of administration are regarded as state rather than local in character." The California constitution, however, places the control of

[1] There are also some special provisions for the city of St. Louis.

[2] See *Readings*, p. 511, for the provisions of the California constitution on this point. Ohio, Texas, and Nebraska now have home rule for cities. See Munro, *Government of American Cities*, chap. iii.

police, police courts, education, and elections within the competence of the city charter-making powers. Since this amendment was adopted as a check upon legislative interference in those matters it is to be assumed that the legislature is excluded from those fields if the city sees fit to prëëmpt them.

4. Among the constitutional methods devised for checking state legislatures and at the same time permitting desirable special legislation for cities, that embodied in an amendment to the Illinois constitution, adopted in 1904, is important because it has proved effective. That constitution has the usual provision against the incorporation or organization of cities, towns, or villages, or changing or amending their charters by local or special law. To permit the legislature to give Chicago special treatment the constitution was amended in 1904 so as to permit the legislature to pass "all laws which it may deem requisite to effectually provide a complete system of local municipal government in and for the City of Chicago." However, it placed a check upon this power of special legislation for Chicago by providing that no such law can take effect until approved by a majority of the legal voters of the city voting thereon at any general, special, or municipal election. Under this provision the people of Chicago rejected a special charter passed by the legislature and submitted in 1907. This charter was, in the main, the work of a commission of Chicago citizens appointed for that purpose, but it was made obnoxious when it reached the legislature by the insertion of several objectionable features. This legislative action caused the rejection of the charter when submitted to the people. So far as one can judge, these constitutional provisions enable the people of Chicago to escape objectionable special legislation, while the way is left open for special legislation acceptable to them. They may not be able to get what they want, but they can at least escape improper legislation unless it is embodied in general laws.[1]

The City Council[2]

Turning now from the position of the city in the state to the organization of municipal government, we are confronted by a be-

[1] For this statement I am indebted to Professor A. R. Hatton.

[2] See Fairlie, *Essays in Municipal Administration*, chap. vii.

wildering variety of institutions that seem to defy all attempts at classification or orderly treatment; but certain general features may be drawn out by the comparative process.

Every city has a legislative body of some form and endowed with some powers of local government. In the beginning of our history, the city council, following the old English plan, was a unicameral body with two classes of members, common councillors and aldermen;[1] but after the Revolution many states began to model their city governments on the plan of the commonwealth governments by providing a council of two chambers, and indeed nearly all of our important cities have had at one time or another double-chambered councils. They did not prove to be very efficient or successful legislative bodies, however, and the plan has been slowly abandoned in favor of the single-chambered council, so that to-day a large majority of our great cities, including New York, Chicago, Cleveland, San Francisco, Cincinnati, Minneapolis, Boston, New Orleans, and Indianapolis have councils composed of only one house. Philadelphia, at last in 1920, abandoned the ancient two chamber system and established a single council of 21 members.[2]

The terms of city councillors range from one year to four years, but are more commonly fixed at two years, as in the city of New York. As a rule, members of the city council are elected by the district ticket; that is, the city is divided into districts or wards, and one representative is returned from each.[3] The number of councillors varies greatly. New York has 73, including the president of the board and the five borough presidents. San Francisco has 18 (elected at large); Chicago, 70; and Boston, 9 (elected at large).

Many objections have been brought against the district system, on the ground that the districts are arbitrary divisions, that there is not the same need for local representation in cities which occurs in the state at large, and, furthermore, that the district system does not make any provision for securing the representation of minorities. One of the most notable examples of the way in which the district system may exclude a powerful minority from all share in the city government is the New York election of

[1] Above, p. 14.

[2] See Dr. F. W. Caker's analysis American Political Science Review, November, 1919, p. 643.

[3] Sometimes more than one.

1892, in which the majority, with a vote of 166,000, elected every member of the council, while the minority, with 100,000 votes, was entirely unrepresented.[1]

Somewhat analogous conditions have existed in other cities at times, and have led to a demand that provisions be made for minority representation. In the New York constitutional convention of 1894, for example, such a reform was proposed, and in support of this principle Mr. Root said: "I do not know whether this is desirable. There is one thing about it that I can say. It is, that in a great city it is not practicable to secure the same kind and variety of representation by means of cutting the city up into districts which you get when you take the different counties of the state, or when you take the different towns of a county, for the reason that locality counts for nothing in the city, except in isolated cases. Here and there will be a neighborhood which is homogeneous, the people dwelling about a square, the people in a little section of a street; but as a rule, my next-door neighbor is not the man who lives next to me; he is the man, perhaps, who lives three or four miles away, and whom I meet in business, at church, at the club, in various enterprises. Locality counts for nothing. The lines of demarcation between localities do not differentiate representation, and every man elected to a municipal legislature represents the whole city as much as he represents the particular division from which he is elected. So, Mr. Chairman, the only logical way in which to elect representatives would be on a general ticket; but if you elect them on a general ticket, either one party or the other would have the whole, and the only way to secure any variety of representation in the discussion of contending interests, in the rectification of the ideas of a majority at conflict with the minority, such as we get in our legislature by electing from different counties, is by means of some plan of proportional representation or minority representation." [2]

The proposition to provide for this, however, was strongly combatted on the ground "that the true theory of democratic government is not in the representation of every crank and every 'ism'

[1] The system of electing at large will also result in excluding minority representation unless some plan of cumulative voting is devised. (See above, p. 523.)

[2] *Revised Record of the New York Constitutional Convention*, Vol. III, pp 560–651.

in legislative bodies, but in carefully selecting the men and measures which shall conserve the greatest good for the greatest number." [1] It was pointed out also that under a system of minority representation a party possessing a large plurality could be outnumbered by a combination of minority factions, and thus responsible rule would become impossible. The argument against the reform prevailed in the constitutional convention.

Notwithstanding all the various reforms which have been devised for cities in the United States the municipal council has, generally speaking, declined in its powers and in public esteem.[2] Just as the early authority of the state legislatures has been curtailed by one restriction after another, so the original power of the municipal council has been shorn away by one process or another. The state legislatures are increasing the range of their general legislation with regard to sanitation, tenement houses, public health, education, and police; and the extension of this general legislation has naturally curtailed the powers of city councils. Their powers have been further reduced by the creation of separate boards and departments — such as the board of estimate and apportionment in New York, which really has entire control over the finances of the city. The former right of appointing municipal officers has been taken away from the council in a large number of cities and vested in the mayor. Furthermore, the general ordinance power of the council is being curtailed, either by positive prohibitions in the charter or by the inclusion of much legislative matter in that instrument. Under these circumstances it is small wonder that the city council has been falling into neglect and inglorious decay. The condition became so notorious in Boston that a committee making an official investigation reported that membership in the legislative body of the municipality was a discredit rather than an honor, and that it was difficult to induce representative men to become candidates for either branch.[3]

In more than 400 cities, the inefficiency and dishonesty of the city council has led to its complete abolition and the substitution of a small board of directors elected at large — a commission with full legislative and administrative powers.[4]

[1] *Ibid.*, Vol. II, p. 172.

[2] Chicago is a notable exception. See Deming, *Government of American Cities*, pp. 91 ff.

[3] See *Readings*, p. 521.

[4] See below, p. 598.

However, all those who recognize the evils so prevalent in the city council are by no means convinced that such a branch of municipal government should be abolished. Many eminent publicists suggest, in the place of this drastic cure, a complete rehabilitation of that body. They argue that a deliberative representative assembly is indispensable in city government to bring the sense of the people and their varying interests to bear in legislation; that the insignificant power enjoyed by the city council is largely responsible for the fact that few energetic and capable citizens are willing to be candidates for membership; and also that it is only through a representative common council that party politics can be kept out of the administrative offices. "It is plain," says Mr. Dorman B. Eaton, "that a true council is in its nature a non-partisan body because one in which . . . all party interests and sentiments of importance will be represented. To increase the authority of the mayor is, therefore, to increase the power of party in the city government; while to increase the authority of the council is to augment the influence of the non-partisan and independent elements among the people." [1]

The Powers of the City Council

First among the general powers of the city council may be placed its "police power." Unlike the state legislatures, the council is usually restricted rather narrowly in this matter by the terms of the charter, but a proviso is frequently added to the effect that it may exercise the "powers necessary to preserve the peace and good order of the community and promote the public welfare." The board of aldermen or city council ordinarily has the power to make, amend, and repeal ordinances relating to health, parks, fires, and buildings, except in so far as such power is conferred on the heads of departments or on other boards, and not controlled by state or federal law. The aldermanic council may make ordinances relative to beggars, vagrants, intoxication, fighting and disorder in the streets, public amusements, markets, gambling, bathing places, suppression of vice and immorality, the preservation of peace and good order, the use of firearms and firecrackers in the streets, parades, steam vessels, advertisements, circuses, obnoxious business, and other similar matters. It

[1] *The Government of Municipalities*, p. 252.

must be noted, however, that in New York City, in accordance with the practices adopted in many American cities, the law-making power is really distributed among the council, departments, boards, and single officers.[1]

It is in matters of finance that the city council has suffered the most serious decline from its former position, for nowhere in the United States does it enjoy the privilege of imposing general taxes at will. The power of the city to incur debts is also restricted either to a definite sum or to a certain percentage of the assessed valuation of the property. The constitution of New York, for example, provides that no city or county may become indebted for any purpose or in any manner to an amount exceeding ten per cent of the assessed value of its real estate subject to taxation; but in 1909 an amendment was adopted enabling New York City to subtract from its total debt debts incurred for certain self-sustaining public improvements.

Even such power of laying taxes and incurring debts as the city possesses is, in an increasing number of instances, being taken away from the city council.[2] In New York, for example, the budget of the city, which determines the amount of taxes which shall be raised, as well as the different objects to which the revenue shall be devoted, is prepared not by the board of aldermen but by the board of estimate and apportionment, composed of the mayor, comptroller, president of the board of aldermen and the presidents of the five boroughs into which the city is divided.[3] The estimates contained in the budget as drafted and approved by the board of estimate and apportionment may be reduced but they cannot be increased by the board of aldermen, to whose approval they must be submitted.

As a general rule, the city also has no power to determine the character of the taxes laid; and in many cases the rate of tax it may impose is limited by law. In most instances the city is permitted to add a certain percentage to the amount levied

[1] On the way in which the original sanitary code of New York was drafted and adopted by the board of health, see Eaton, *The Government of Municipalities*, p. 263.

[2] Below, p. 604.

[3] The mayor, comptroller, and president of the board of aldermen have three votes each, the borough presidents of Manhattan and Brooklyn two each, and the borough presidents of the Bronx, Queens, and Richmond one vote each.

on property for state purposes; but in New York, owing to the separation of state and local revenues,[1] each city must derive its revenues principally from taxes on real estate and personal property.

In former times the city council enjoyed a large power in granting franchises for the construction of municipal utilities, such as waterworks and lighting systems, and in regulating public service corporations. It has been found by practical experience, however, that many city councils have been guilty of corrupt practices in the exercise of this power and it has, therefore, been withdrawn in many instances. Where it is not exercised by the state legislature it is frequently vested in boards or commissions, such as the board of estimate and apportionment in New York. As the result, the power of the city council is often reduced to issuing petty licenses to tradesmen and to regulating only minor matters relative to public utilities. In a majority of cities, however, it still retains a considerable measure of power over franchises; but in many of them it is subject to a referendum to the voters.[2]

The city council has also been shorn of its former authority over the administration of the city, and it stands to-day in a sharp contrast to the English council which elects the mayor and through various committees superintends the several departments of municipal administration. In the United States, the city council seldom has any large appointing power and its influence over the administration is of slight importance. In general, the heads of departments and the municipal boards are either elected by popular vote or appointed by the mayor, sometimes with the approval of the council. The council furthermore does not enjoy the right of removing officers and thus controlling the general direction of the executive department.

To bring the administration and the council together, however, the charter of New York provides that the heads of administrative departments shall have seats in the board of aldermen, must attend when required, must answer questions on due notice, and may participate in the discussion without enjoying the right to vote. The board of aldermen is charged with seeing to the faithful execution of laws and ordinances of the city, and it may

[1] Below, p. 715. [2] Below, p. 597.

appoint committees to examine the books and records of any department or officer. In practice, though, it cannot be said that the board of aldermen of New York enjoys any large authority over the administration.

Finally, the ordinances passed by the city council are subject to the mayor's veto. In New York City, an ordinance vetoed by the mayor can go into effect only when repassed by two-thirds of the council, or by three-fourths if it involves expenditures, debt creation, or assessment, and the mayor's veto on grants of franchises, such as the council may make, is final.

The Mayor

The city has a mayor or chief magistrate who is, except in a very few instances, elected by popular vote. His term of service varies from one to four years — annual election being most common in New England. The term in Pittsburgh is three years, in New York City, Chicago, and Boston four years, and in some other important cities, such as Baltimore, Kansas City, Milwaukee, and Seattle, it is two years. The salary of the mayor varies from a few hundred dollars in the smaller cities to $15,000 a year in New York — an amount one-third larger than the salary of the governor and the largest in the United States.

The powers of the mayor extend to legislative, administrative, and financial matters. Like the governor of the state, it is his duty to communicate at least once a year to the board of aldermen a general statement on the finances, improvements, and administration of the city. He may recommend to the city council, either in his annual message or from time to time, such measures as he may deem expedient. He furthermore enjoys the veto power in most of our cities; and mayors, following the example set by the governors,[1] have frequently used the veto, not only to defeat unlawful ordinances, but also to prevent the passage of measures which they deemed adverse to public interest. The mayor, in many cities, enjoys the power to veto separate items in appropriation bills.[2] Following the example of the state constitutions, our city charters often provide that a vetoed ordinance

[1] See above, p. 498.

[2] For example, in Baltimore, Boston, New Orleans, Philadelphia, St Louis, New York, and San Francisco, and in all Ohio and Illinois cities.

can become law only when repassed by the council by an extraordinary majority, sometimes two-thirds and in many instances even more; but in a few smaller cities the mayor's veto may be overridden by the repassage with the ordinary majority.

The financial powers of the mayor vary from city to city, but it may be said with safety that they are being steadily increased in the greater municipalities. The mayor not only enjoys, as we have seen, the power of vetoing financial measures, but he also has, in a number of instances, a very large control over the making of the city budget. It seems that in Boston the budget has long originated with the mayor as a matter of practice; and on the recommendation of a commission appointed to investigate the government of that city the preparation of the budget was vested in the mayor, in law (1910) as well as in practice.[1] In New York City, the mayor enjoys a very peculiar position with regard to finances. He is a member of the board of estimate and apportionment [2] and as such possesses three votes out of a total number of sixteen. He also has the power to veto bills involving finances passed by the board of aldermen, and it takes a three-fourths vote to override an exercise of this power. In Baltimore, the mayor is likewise a member of the board of estimate and he is a member of the commission of finance in charge of the sinking funds. It is also strongly recommended in the municipal program of the National Municipal League that a large power in arranging the city budget should be given to the mayor. This development is, of course, in line with the evolution of the budget system in England, where the preparation of the budget is vested in a responsible finance minister who is in close touch with the officers of the administration —and thus with the outgo of the moneys appropriated — and is, at the same time, answerable to the electorate through his responsibility to the majority in the House of Commons. The waste, extravagance, and misappropriation of funds in our cities have been largely due to the fact that the financial administration has not been sufficiently concentrated in the hands of officers responsible to the electorate.

In the appointment of municipal officers and the direction of municipal administration, the power of the mayor is likewise

[1] See *Readings*, p. 524; below, 604.

[2] See above, p. 589.

steadily increasing. In the beginning of our history, municipal officers were generally appointed by the city council; but with the democratic revolution of the first half of the nineteenth century,[1] many of the important offices, boards, and commissions were made elective. It was found, however, by practical experience, that popular election did not actually secure responsibility of elected officers to the voters; for, owing to the number of offices and to the complexity of the election operations, the selection of candidates actually fell into the hands of expert politicians, who made the "slates" and thus secured possession of the municipal government. In order to check the corruption which resulted from this system, the device of "bi-partisan" boards and commissions was adopted with the hope that the representatives of one party would hold in check the representatives of the other party; but, in practice, it turned out that the representatives of the two parties, in a large number of instances, made terms with each other and divided the spoils of office.

Finding that the elective system did not really secure popular election and that the bi-partisan device did not check the spoilsmen, municipal reformers determined to try the experiment of concentrating the appointing power in the hands of the mayor — thus making him responsible for the conduct of the whole administration. This development has reached its highest stage in the city of New York, where the mayor appoints the commissioners of the police force, the department of street cleaning, the fire department, the department of parks, the department of health, the tenement house department, and, in short, the heads of all important branches of the municipal administration; and enjoys also the unrestricted power of removing these municipal officers, except members of the board of education, judges, and a few others.

In the commission-manager form of government (p. 602) all administrative authority is concentrated in the hands of the city-manager, who appoints department heads. The manager is elected by the commission.

Municipal Administration

As in the state and national government, so in our city governments, the growth of population and the development of many

[1] See above, p. 79.

special social problems have rendered necessary the multiplication of municipal functions; and to secure efficiency and responsibility almost every device known to the history of municipal administration has been tried in the United States. We have intrusted the great departments of administration — such as police, fire, streets, public works — to elective boards, to appointive boards, and to bi-partisan boards; and now, after many years of experimenting, we seem to be going in the direction of single-headed administrative departments. In the commission form each commissioner usually acts as the head of a department; but relies on technical men to do the actual work of administration. Under the city manager plan, the manager appoints department heads; under the mayor form, the mayor selects them.

The single-headed system, however, is not without its defects. Owing to the complexity of the duties required in the administration of a large municipal department, we cannot expect efficiency where the term of office is short and where the office is generally looked upon as a reward for political service. On the other hand, permanent tenure means the development of an official class which is regarded with suspicion by the American public and which in practice, by virtue of its mastery of the mysteries of the government, tends to check democratic control. It has been suggested, therefore,[1] that the various departments of municipal administration might be placed in the hands of unpaid boards, the members of which would determine only matters of general policy, leaving the technical details of administration to permanent officials selected for the most part under civil service rules.

Although the interest of the student and citizen usually centres in the mayor and council, the branch of municipal government which maintains the most intimate contact with life and property is the group of administrative officers charged with carrying out the great functions which the city undertakes. There is little that is spectacular in the regular discharge of these duties, but upon them depends the excellence of the city's government. The making of laws is a relatively simple matter; the execution of them against thousands or millions of people and enormous property interests is the task which throws the greatest strain upon the machinery of government. The

[1] Goodnow, *Municipal Government*, p. 228.

executive officer's work and responsibilities continue night and day; the council may speak its will and adjourn. It is easy to make a model law about tenement houses, for instance; but the condition of the homes of the people depends quite as much upon the efficiency and policy of the department in charge as upon the details of the law. How to organize administrative departments and make them efficient and enlightened is one of the great problems of city government.

The first element in this problem is the proper grouping of the functions assigned to the several departments. This depends of course largely upon the size of the city and the nature of the duties created by law. With the growth of commission government, there has been a tendency to consolidate departments and to group all functions under a few heads, so that each one of the commissioners may be held responsible for a separate department. Des Moines, Iowa, for example, has five departments: public affairs, accounts and finances, public safety, streets and public improvements, and parks and public property; and under each of these are arranged the allied minor branches of administration. In a large city, without commission government, there will be found additional subdivisions such as police, fire, water supply, street cleaning, tenement house, and health departments.

The crossing of the interest of the several functions makes an entirely satisfactory distribution of work among departments difficult. The relation of street cleaning and pavement repairing are obvious; but these functions are often under entirely separate heads. The department in charge of public buildings will naturally seek to control the lighting of the said buildings, but the head of the department of gas and electricity will likewise have an interest in that work. Consequently we have a good deal of pulling at cross purposes in city government, and this is augmented when vitally related matters are placed under the management of separate departments.

Dr. W. A. Schaper, of the Minneapolis charter commission, proposed in 1912 the following classification of administrative functions, which is full of suggestiveness for any city of considerable size: —

I. Department of city records.

II. Department of Law.

III. Department of health and hospitals, including control of hospitals, care of the poor, scientific studies on health problems, garbage collection, and inspectional services.

IV. Department of public works, including control of streets, sidewalks and bridges, sewers and city waterworks.

V. Department of finance, including assessment, collection of taxes, and accounting.

VI. Department of public safety, including police, fire, building inspection, and workhouse.

VII. Department of parks and public grounds.

In order to unify still further the work of the several departments, Dr. Schaper proposed a special conference committee, consisting of the mayor, the city attorney as legal adviser, and heads of the four leading departments, to be intrusted with the supervision of the general conduct of the city's business, including letting contracts, acquiring land, proposing the budget, suggesting ordinances to the council, and making appointments under civil service rules.

After the organization of departments and the assignment of functions comes the problem of securing efficient public servants for the subordinate positions. We are at present trying out many schemes. In 1910, Kansas City, Missouri, inaugurated an interesting plan for creating a board of citizen experts to coöperate with the civil service commission in holding examinations and selecting municipal employees for special functions. For example, when the post of city engineer became vacant three engineers of high standing in public and private life were chosen to help the civil service commission to select an efficient engineer.

The method of securing civil servants generally which is gaining favor in the United States is the merit or competitive system, under which city employees are appointed on the basis of examinations designed to test their abilities. The United States Civil Service Commission in its report for 1911 printed a list showing the extension of the system to some or all branches of municipal administration in 217 cities, including New York, Massachusetts, Ohio, and Wisconsin cities.

The merit system includes the following elements: —

I. A municipal commission, appointed by the mayor, as in New York cities, Chicago, and Philadelphia. In Massachu-

setts, the cities are under a state commission appointed by the governor.

II. A system of examinations is designed to test the abilities of the candidates for the several fields of city work which they seek to enter.

III. A plan for requiring the appointing officer in each department or division to select his subordinates from an "eligible list" made up of candidates who have passed the required examinations. Usually the officer is required to select from the three standing highest on a list, but more recently has come a demand that he appoint the man who stands highest and none other.

IV. A plan for removal, either with or without granting the employee a hearing on charges.

V. Sometimes a system of pensioning employees is established, particularly for teachers, policemen, and firemen.

Municipal Democracy

The suffrage for voting in municipal elections is usually the same as for the state at large, but there is one exception. Rhode Island restricts the vote for councillors by a special property qualification.

Not only is the suffrage generally unrestricted by property qualifications; special efforts are now being made to increase the active participation of the voters in municipal politics by new devices.

1. The principle of the initiative and referendum is being rapidly adopted for municipal as well as state affairs, so that the voters may initiate measures and force the reference of ordinances, franchises, and other matters of importance to the electorate at large. No less than twenty states have adopted the initiative and referendum for some or all of their cities: California, Colorado, Delaware, Idaho, Iowa, Kansas, Maine, Massachusetts, Mississippi, Missouri, Minnesota, Montana, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas, and Washington.

2. The principle of "the recall" is also being adopted, especially in the cities with commission government. Under this system elective municipal officers may be forced to stand for a new election, or withdraw altogether, when, on demand of a certain

percentage of the voters, a new election is held. The principle was applied in a modified form in Boston in 1910, but later abandoned.

3. Finally, party conventions for municipal nominations are being abolished in favor of nomination by petition or direct primary.[1] The petition system is now in force in Boston, and candidates for mayor and councilmen are nominated by petitions signed by 5000 voters. The direct primary or non-partisan primary is quite generally used in connection with the commission form of city government.

Commission Government

No lengthy argument need be adduced to show that the government of the great American city is a complex process requiring a multitude of detailed technical and expert operations subject, in matters of general policy, to the control of the electorate. By its very complexity it offers a multitude of opportunities for waste, corruption, and maladjustments. On the side of its administration the city is a gigantic business concern requiring for its proper conduct something more than mere election enthusiasm. Speaking abstractly, all of its branches should be carefully integrated so that there can be no conflict of authority, no waste in the purchase of supplies, no neglect of duties by the employees, no misuse of funds appropriated, and no protection for vicious interests seeking to evade the law or to wrest privileges from the city.

Recognition of this fact has led several American cities to abolish completely the old form of government by mayor and council, and to substitute for it government by a commission composed of a few men endowed with full legislative and executive power in the city. Although there had been for some time a tendency toward greater centralization in municipal management, the movement for commission government may be dated from the reconstruction of the government of Galveston, in Texas, after the great storm of 1900, which destroyed a large portion of that unhappy city and sacrificed some 6000 lives. For a time, the government of that municipality was paralyzed, for the great problems connected with the reparation of the ruin were too much for the old political machine which had control. A committee of citizens was chosen to formu-

[1] *Readings*, p. 530, and below, chap. xxx.

late a new charter, and they drafted an instrument which vested the entire government in the hands of five commissioners, three appointed by the governor and two elected by the people of the city without regard to ward lines. This charter was adopted, but its appointive feature was declared unconstitutional.

A revision soon followed and the government of Galveston was vested in a mayor and four commissioners elected at large by the voters of the city and invested with all the rights, powers, and duties of the mayor and board of aldermen. The administration of the city is divided into four departments: police and fire, streets and public property, waterworks and sewage, and finance and revenue; and the mayor and the four commissioners are required by the charter to designate from their own number a commissioner for each of the four great departments. The mayor president is merely one of the commissioners, although no city department is assigned to him, and exercises a "general coördinating influence over all."[1] The board meets at stated times for the transaction of public business very much as the board of directors of a great corporation would meet to discharge their functions.

This commission form of government with modifications has now been set up in about 400 cities scattered from Massachusetts to California;[2] and a number of states, including Iowa, Kansas, North Dakota, Mississippi, Minnesota, Wisconsin, and Oklahoma, have passed laws authorizing their municipalities, under certain conditions, to adopt the new plan. The system varies somewhat from city to city, but the fundamental principle is

[1] See the excellent article by Professor W. B. Munro, "Galveston Plan of City Government," *Providence Conference for Good City Government* (1907), p. 144. See also Beard, *Digest of Short Ballot Charters*.

[2] An important variation on commission government known as "the city manager plan" has developed. It was adopted first in 1912 for Sumpter, South Carolina, and has since been adopted in Dayton and Springfield, Ohio, and about 150 smaller places. Under it the commission remains, but it is confined to purely representative and legislative functions. The chief executive, or city manager, is chosen by the commission and given full power over all the executive business of the city, including the appointment of subordinate officers. The aim of the plan is to make use of council (or commission) as the legislature in the proper sense of the word, but to secure experts for executive work. The National Municipal League at its annual meeting in 1913 endorsed the plan.

the same everywhere — the concentration of executive and legislative power in the hands of a small body, usually of five men, elected at large by the voters of the city. Several of the cities, notably Des Moines, Iowa,[1] have added a system of initiative and referendum and also a device whereby a certain percentage of the voters may "recall" any one of the commission — that is, force a new election for the office. There is also a general tendency to abolish party methods of making nominations and substitute a non-partisan primary which excludes party emblems from the ballot and permits any one to run who secures a certain number of voters to sign his petition.

Commission government, as Professor Goodnow points out,[2] is a return to the original type of city government in the United States in so far as it concentrates all powers, administrative and legislative, in one authority. It differs, however, from the original council system in that its members do not represent single districts, but are elected at large by the voters of the entire city — a practice which, of course, substantially excludes minority representation, and is so far highly undesirable. From the standpoint of pure business administration, the commission form of government has many features to commend it. It centralizes power and responsibility in a small group of men constantly before the public and subjected to the scrutiny of public criticism; it coördinates the taxing and spending powers, thus overcoming the maladjustment so common to American public finance; and it throws down that multiplicity of barriers behind which some of the worst interests in American municipal politics have screened their antisocial operations.

On the other hand, it destroys the deliberative and representative element in municipal government, and may readily tend to reduce its administration to a mere routine business, based largely upon principles of economy, to the exclusion of civic ideals. Furthermore, it is claimed that we get greater responsibility by concentrating administrative power in the hands of the mayor than by dividing it among five commissioners each of whom is an executive officer.

Another serious criticism of the commission system is based on

[1] For the initiative, referendum, and recall, as applied in Des Moines, see *Readings*, p. 529.

[2] *Municipal Government*, p. 176.

the contention that, in the light of our municipal experience, it concentrates too great a power in the hands of a few men and makes it easier for those who wish to buy a city government to carry out their design. Iowa, however, has sought to meet this objection by establishing the system of recall noted above.[1] Under this system twenty-five per cent of the voters, who disapprove of the policy of any commissioner or believe that he is not discharging his functions honestly and efficiently, may petition for his removal and compel a new election. The whole question is then submitted to the electorate at large, and if the commissioner is upheld, assuming that he stands for reëlection, he retains his office, but if defeated is supplanted by the popular choice. This system of recall has been extended to some cities which do not have the commission form of government, and is ably defended by many publicists on the ground that it conduces to effective popular control.

Under the Iowa scheme all important franchises must be submitted to popular vote before going into effect; municipal ordinances may be initiated by the voters, and ordinances passed by the commission must be referred to the electorate on a petition properly signed and filed.

The danger of concentrating power in the hands of such a small body is further offset in the Iowa law by the abolition of the party convention as a means of nominating candidates for the offices of mayor and councilmen and the substitution of nomination by direct primary. No party ballot is used at this primary; names are placed upon it by petition; and the two aspirants receiving the highest vote for mayor and the eight aspirants receiving the highest number of votes for councilmen are put upon the regular ballot as candidates for the offices of mayor and councilmen. This ballot is then submitted to the voters at the regular election. While this system does not prevent members of parties from concentrating their efforts upon their own candidates, it does prevent the politicians from forcing their ready-made "slates" upon the voters; furthermore, at the regular election it focusses the attention of the public upon only two candidates for each of the five offices.

This general tendency toward the concentration of power

[1] See *Readings*, p. 531.

was manifested in the revolution that took place in the government of Boston in 1909. The bicameral city council was abolished and a single-chambered body, composed of nine men,[1] elected on a general ticket by popular vote, was substituted. Partisan nominations for city offices were abolished and nomination by petition signed by 5000 voters adopted. The mayor was authorized to originate all the appropriations except those for school purposes, and the city council merely given the power to reduce any item. The mayor was also given the absolute veto over any ordinance or resolution carrying an appropriation with it. To secure adequate scrutiny and publicity for taxation, appropriations, and expenditures, a permanent finance commission, appointed by the governor, was created and invested with the power of examining all matters relating to appropriations, loans, and expenditures. To improve the personnel of the city administration, a provision was adopted requiring the heads of departments to submit the names of their appointees to the state civil service commission for investigation and approval; and, to remove the control of the politicians in the council over appointments, the mayor was empowered to fill all important administrative offices.[2]

It was to meet the objections brought against the commission scheme of government that city after city began, about 1914, to turn to a new form known as the city manager plan (above, p. 599 note). In 1920 about 150 cities and towns had adopted the idea. Among the larger places were Dayton, Springfield, and Akron, Ohio; Grand Rapids, Michigan; Wichita, Kansas; Norfolk, Virginia; and Kalamazoo, Michigan. Under this plan administration is once more centralized under a single officer — the manager — but he is elected by the council instead of by popular vote, and he may be removed by the body that selects him. The commission acts as the legislative body and the manager's business is to execute the orders given to him. In practice, however, he exercises considerable leadership in directing the affairs of the council or commission.[3]

[1] Three to be elected annually.

[2] Except the school board, which is elective.

[3] See the valuable work on the city manager plan in Dayton, Ohio, by C. E. Rightor, *The City Manager in Dayton*.

CHAPTER XXVIII

MUNICIPAL FUNCTIONS

Municipal Finances

As in the case of the state government, the most important functions of the city at present are those connected with raising and disbursing funds; and, inasmuch as corruption and inefficiency are constantly arising in our municipal finances, special attention has been given within recent years to the problem of budget-making and effective control over city expenditures. In our great cities the financial problem is vast and complicated. The budget of the city of New York for the year 1909 totalled $156,545,148.14 — five times the budget of the state for the same year, and four times the combined budgets of Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, and Georgia. The annual increase of the budget of New York within recent years has been greater than the total budget of St. Louis or Baltimore and Cleveland combined, — five times greater than the total budget of Louisville, Kentucky, and ten times greater than the total budget of Kansas City.

Even if all of the officials of the city administration are men of unquestioned integrity, great waste and extravagance in expenditure will inevitably arise unless there is provision for the most scientific bookkeeping and adequate scrutiny and control by capable and responsible authorities. An investigation in New York City, in 1908, resulted in some remarkable revelations. It was discovered that cheap coat hooks which any citizen could buy for five cents apiece had been purchased by the city at sixty cents apiece, with an additional charge of five cents for each small screw used to put up the hooks. One hundred and sixty-five hooks, 172 bolts, and 18 screws cost the city of New York

$117, and it took two workmen thirty-one days at $8 a day to put up the 165 hooks — making a total cost in materials and labor of $365.10, or $2.21 a hook. It was found also that the police department paid 21 cents a pound for nails which any private citizen could get for 4½ cents. A charming bit of "high finance" in street contracting was also unearthed: a contractor who was paid to make excavations for paving a street was also paid $900 for filling in a near-by road with the dirt removed from the first one.[1] Similar extravagances and wastes could undoubtedly be discovered in any other large city in the Union.

To remedy these undoubted evils in municipal finance many reforms have been devised and projected. There is, in the first place, a general tendency, as we have seen, to take the initiation of the budget out of the hands of the city council and vest it in the mayor or some smaller body. In New York, the budget is made by the board of estimate and apportionment composed of the mayor, comptroller, president of the board of aldermen, and the presidents of the five boroughs. The budget of Boston is originated by the mayor, and city finances are scrutinized by a commission appointed by the governor. In several other cities budget-making is also vested in the hands of a special authority. In some Ohio cities, the mayor makes up the budget from estimates furnished by the departments; the council may omit or decrease items, but cannot increase the total of the budget. In Denver, the mayor formerly made the estimates and a two-thirds vote was required in the council to change them. In New York the board of aldermen may decrease but not increase items in the budget presented by the board of estimate.

To secure the desired efficiency in controlling city finances, even where small responsible boards are in charge, many specific reforms have been suggested by experts, of which only a few can be enumerated here.[2] There are two aspects of budget-making. On the one side the will of the voters with regard to the several amounts to be appropriated for the great purposes of city government should be realized, and some provision must therefore be made for enabling the citizens who wish to bring influence to

[1] See the Outlook for August 28, 1909.

[2] See the publications of the Bureau of Municipal Research, 261 Broadway, New York City; and the Political Science Quarterly for December, 1908.

bear on behalf of certain institutions, such as the tenement, health, and school departments, to have an adequate opportunity to be heard by the public authorities in charge of making up the budget. In New York City, the law provides for hearings by the board of estimate and apportionment and it is a common practice for the various departments, taxpayers' associations, and other interests in the city to present their claims. Advocates of improvement in our educational methods, those who wish to see more searching tenement-house and sanitary inspection, those who want new systems of transportation, and all other groups desiring the city to undertake or extend or curtail any particular functions, may present their respective demands before this board.

The second aspect of budget-making is largely concerned with technical matters — the effective execution of the public will in the disbursement of funds. In early days it was the common practice of city councils to appropriate large amounts in lump sums to heads of departments to spend at their discretion. Such an appropriation would run: "To the police department for the year 1885, the sum of $275,000 for salaries, wages, supplies, etc., etc." In order to get control over expenditures, the authorities in all progressive cities are adopting the practice of itemizing in detail the purposes for which appropriations shall be spent, classifying them under such heads as salaries and wages, supplies and materials, etc. In some places the process has been carried too far and the hands of administrators have been too closely tied by minute specifications.

On this technical side certain positive demands are being made in the name of efficiency.[1] A uniform system of bookkeeping should be established in all departments, and when the budget-making authority desires to secure specific information from them it ought to send out uniform questions and secure uniform answers, "so that the salary changes and costs of supplies and repairs, etc., will mean the same thing in all estimates, for each department, and for each main division of work." The estimates for pay-rolls and general maintenance for each department should be made on an annual, not a monthly, basis. When increases in pay-rolls are demanded, it should be specifically stated whether

[1] See publications of the Bureau of Municipal Research, 261 Broadway, New York City.

the increases are for additional employees or for higher salaries. The tentative estimates of each department containing great specific detail should be prepared in advance and made available to the public a considerable period before the actual making of the budget.

To enable the public to play its part in the framing of the budget, it is necessary for civic bodies to be active in laying before the people in various ways, especially through the press, the salient features of general interest in the proposed budget. While the estimates are still in tentative form, public hearings should be granted, and after the whole budget is ready for its final adoption its principal features should be made public again, and further hearings granted. It is also suggested that, in connection with the publication of the leading items of the tentative budget, statements should be made with regard to those demands of the citizens which had been rejected.

Public control should extend beyond the making of the budget to the disbursement of funds, because it is a common practice for public officers to use funds for other purposes than those indicated in the actual appropriation. It is suggested, therefore, that "a resolution should accompany every budget to the effect that moneys therein appropriated may not be used for other purposes without authority from the appropriating body and without due notice to the public." To prevent the head of any department from spending his allowances early in the fiscal year and becoming bankrupt later, the amounts voted for each pay-roll should be so divided that the disbursements for any one month do not exceed one-twelfth of the total annual appropriation.[1] Finally, "to make possible these steps and to make certain their execution, it is necessary to have from the first day of the year in all of the departments modern business methods of describing work done when done, and money spent when spent, plus methods of inspection and of audit to see that the rules are complied with and the truth told."[2]

[1] The city comptroller of New York is now instructed to supervise the monthly pay-rolls and to see that the sums of money voted are expended for the purposes for which they were designed.

[2] On taxation, see below, chap. xxxi.

Police Administration

A primary function of a municipality, of course, is the exercise of the police power in its narrowest sense; that is, the enforcement of the law against thieves, burglars, murderers, incendiaries, and criminals of every type, high and low. This work is intrusted to the police force; and in America the police is regarded as a branch of local government, although in a few states a somewhat strict control is placed in the hands of the central administration. The New York legislature, for example, in 1857, combined New York City, Brooklyn, and some contiguous areas into a single metropolitan police district under the supervision of a state commission, but thirteen years later the scheme was abolished. There is to-day, however, a special division of police charged with enforcing the election law in the metropolis and placed under the control of a state commissioner appointed by the governor. In Baltimore, St. Louis, and Boston the police boards are branches of the state administration. In Pennsylvania and some other commonwealths there is a special state police force.

It is pointed out in defence of the state system of control that in the present condition of American politics the police department too often falls under the control of the vicious elements of the population against which it is supposed to enforce the law. The governor of Massachusetts said in 1868, "It is apparent that public decency and order and public justice require the maintenance of an executive body which shall not be controlled by the public sentiment of any locality, and which shall be competent in its spirit, its discipline, and its members to a reasonable and judicious but just and impartial enforcement of the statutes of the commonwealth." [1]

[1] Quoted in Goodnow, *Municipal Government*, 260. Professor A. R. Hatton, in a paper read before the National Municipal League in 1909, made the following suggestions for a plan of coördinating state and local police control:

1. Police commissioner in each city to be appointed by the mayor; term, during good behavior; removable by mayor after a public statement of charges.

2. Mayors, police commissioners, and sheriffs to be removed by the Governor after public statement, for delinquency or corruption.

3. A system of state inspection of local police.

4. A small but efficient state detective force under the supervision of the governor to assist him in keeping informed of local conditions.

5. Centralization of state inspection and detective work in a state bureau.

Cincinnati Conference for Good City Government, 1909, pp. 157 ff.

It is the general practice in the United States, however, to vest the control of the police force in some local authority, but the greatest divergences have arisen in the construction of that authority. In the middle period of our municipal development the supervision of the police was generally intrusted to a board, which was, in some cities, made elective. The board system was popular for a time, largely because it secured representation for both political parties, which were supposed to watch and check each other. It was soon found by experience that instead of watching each other they frequently combined to divide the spoils. The board system, moreover, did not fix responsibility in any single person, and when charges of corruption and inefficiency were preferred, each member would plead not guilty, and very probably attempt to shift the burden to some other member. The difficulty of placing the responsibility at length led in most large cities to the abandonment of the board system and the concentration of supervision in the hands of a single officer appointed by the mayor.

In the city of New York, for example, the police commissioner is appointed by the mayor for a term of five years and he may be removed by the mayor at any time.[1] He is charged with the administration of the police department and the supervision of the police force; and in order to place full authority and responsibility on him, he is given power to appoint five deputy commissioners to assist him in his administrative duties and in the execution of his policy.[2] This is undoubtedly a highly centralized

[1] He may also be removed by the governor of the state.

[2] This extract from an article by General Theodore A. Bingham, ex-police commissioner of New York City, indicates one of the problems connected with the question of the tenure of office, which is commonly overlooked: "I found immediately that among the officers of the force there were very few I could trust to carry out my orders in good faith. The reason was very simple. I was head of the department for an indeterminate period, which might end at any time. Back of me was the mayor, who chose me, and whose office would also end at an early date. Back of him was the permanent political machine, which elected him. As the policeman is in office for life, he very logically looked past both the mayor and me and made his alliances and took his orders from the only permanent influence concerned — the politician. I could not at that time even choose the leading officers of the department whom I wanted to carry out my orders. I was in command of a body of men who, by the logic of their position, were forced to take their final orders from some one else. That condition of affairs exists to-day, and

system, but if the police force is corrupt and the enforcement of the law is lax, the citizens know how to find a remedy — they bring pressure to bear at once upon the mayor. On the whole, it has worked better than the board system.

The uniformed police force organized on a military basis is a somewhat recent development in the cities of western Europe. In the Middle Ages and well into the eighteenth century, the cities of England relied upon unpaid justices and constables; toward the end of the eighteenth century the practice of employing paid night watchmen was adopted; and at length in 1828 a constabulary force under commissioners appointed by the crown was established for London, in the face of bitter opposition to what was regarded as an inroad upon the liberties of the British citizens.[1] As late as 1840, the city of New York had no regular patrol during daytime and relied largely at night upon watchmen who were otherwise employed during the day; and it was not until 1844 that a completely organized police force was adopted for that city. In the beginning, however, there was great opposition to wearing uniforms; but at length the requirement was made universal. Within a short time organized and uniformed police forces were created for Philadelphia, Boston, Baltimore, and other large cities, and distrust of the military feature disappeared entirely.

For the purpose of police administration, each city of any size is divided into precincts, or districts, in each of which there is a police station and a squad of men. The police force itself is organized on the military principle of graded authorities rising upward from the patrolman to the chief. Ordinarily, there is assigned to each precinct a group of patrolmen; above them there is a sergeant or roundsman who makes periodical tours of the district to see that the men in the rank are doing their duty; over this local force is placed a captain; and the whole city is under the supervision of the chief and his deputies. To facilitate central control, the city may be laid out into large inspection districts in charge of special officers, known as inspectors, who are supposed to keep close watch on the conduct of the subordinates. And usually there is, in addition, a corps

will exist so long as the police commissioner of New York has no permanence in office." — McClure's Magazine for November, 1909.

[1] Reference: Fairlie, *Municipal Administration*, p. 131.

of detectives connected with a central bureau likewise under the general supervision of the commissioner. Most large cities, including New York, also have special divisions of police, such as the bicycle squad, the mounted squad, and the river and harbor squad.[1]

The police administration is one of the most difficult branches of city government because of the opportunities for corruption offered to every member of the force, from the roundsmen on their beats to the police commissioner in his central office.[2] There are everywhere opportunities for discrimination and persecution; gamblers and keepers of houses of ill-fame are willing to pay handsomely for "immunity"; in short, all of the lawless elements of the city which derive profit from plying their respective trades are willing to share their ill-gotten gains with the police for protection. The saloon was long the centre of resistance to law enforcement and in this respect at least prohibition should have a salutary effect.

Not only monetary considerations are brought to bear to induce neglect of duty. Those who have economic interests at stake are always quick to combine and bring pressure to bear through political channels by taking part in primaries and elections, and by contributing heavily to campaign funds and to the private exchequers of political bosses. In every large city in the United States, the criminal elements, deriving profit through police protection, are organized more or less effectively for political purposes, and whenever there is a general exposure they are usually to be found influential in the political party which controls the city government.

These ordinary sources of police corruption are augmented by the attempts of the rural communities to force upon the cities moral standards which the latter do not accept. Furthermore, there is in the United States a marked tendency to penalize every action which the religious elements regard as sinful. A minority of moral enthusiasts can readily push through the state legislature some measure which has no support at all from the great mass of the people and which even the enthusiasts themselves are

[1] To prevent the spoils system from entering into the selection of the rank and file of the police force, New York, Milwaukee, and many other large cities have provided civil service examinations for patrolmen.

[2] See *Readings*, p. 505.

unwilling to uphold by a concentrated and persistent action. Accordingly, we have upon our statute books innumerable laws imposing fines and other penalties for actions which the majority of the people do not even regard as harmful, but which afford the police splendid sources of revenue for neglecting. Thus we have the peculiar situation of political bosses and police corruptionists supporting measures introduced into the legislature by the Women's Christian Temperance Union and the clergy because they know full well that every new penalty imposed yields quick revenue to those who can guarantee immunity to the violators of the law. "There has never been invented so successful a 'get-rich-quick' institution," says Professor Goodnow, "as is to be found in the control of the police force of a large American city. Here the conditions are more favorable than elsewhere to the development of police corruption because the standard of city morality, which has the greatest influence on the police force which has to enforce the law, is not the same as that of the people of the state as a whole which puts the law on the statute book. What the state regards as immoral the city regards as innocent. What wonder then if the city winks at the selling by the police of the right to disobey the law which the city regards as unjustifiable." [1] This, of course, is not an argument against attempting to raise the standard of civilization by the enactment of criminal laws because they cannot be perfectly enforced, but it is an argument against the enactment of laws which have no adequate foundation in the moral sense of the communities to which they are applied.

Closely connected with the police force are the courts in which are tried the offenders, great and small, who are arrested by the patrolmen. The selection of judges for these courts is a serious matter, for these judges have control over the life and destiny of hundreds of poor. It is important that they should be in close and sympathetic touch with the social and economic conditions under which the people who are brought before them are compelled to live. A kind word, a gentle rebuke, or a helping hand at the right moment may stay a new offender on his downward course, or may save from despair some poor person whose only offence is his ignorance, or who may have been arrested without

[1] *Municipal Government*, p. 266.

warrant by some still more ignorant policeman. On the other hand, brutality and indifference in a police magistrate may fill the prison with people who have no business there; may embitter a large portion of the population against what purports to be a system of "justice," and may add to the hopelessness which overwhelms thousands in their fight against the poverty, unemployment, and uncertainty so prevalent throughout all the great urban centres.

A strong argument may be advanced, accordingly, in favor of the election of police magistrates, in order that they may be brought into close touch with the life of the district in which they preside. It has been found, however, that in a number of instances the system of popular election only brings the police justices under the control of the political bosses and organizations supported by the same elements which pay for immunity against the enforcement of the criminal laws. Thus it happens too often that police magistrates are selected, not because they understand sympathetically the problems and conditions of their respective districts, but because they will still further guarantee the immunity enjoyed by the criminal elements which, operating through party organization, put them in power. The recognition of this fact has led in several large cities to the abandonment of the elective system. In New York City, for example, the city magistrates, having power to try petty criminal offences and hold prisoners for trial, are appointed by the mayor for a term of ten years; and the justices of the court of special sessions are likewise appointed by the mayor for a term of ten years.[1]

An important reform has been accomplished in our police administration by the establishment of children's courts in all of the large cities, including New York, Chicago, Indianapolis, St. Louis, Baltimore, Philadelphia, and Denver.[2] The purpose of these courts is to separate juvenile offenders from the old and hardened law-breakers, and to treat them, not as criminals, but as delinquents who need proper care and supervision. It is the practice, therefore, not to commit young first offenders to institutions of any kind, but to let them out on probation, unless

[1] Owing to the crowded conditions of the day courts and the undesirability of holding any one in prison who is not a genuine offender, several of our larger cities, including New York, have established night courts.

[2] See Review of Reviews, Vol. XXXIII, p. 305 (1906).

their home influences are positively pernicious, or their parents testify to their incorrigibility. Accordingly, there have been established in connection with the juvenile courts probation officers whose business it is to visit the homes of first offenders to see whether the instructions of the courts are being obeyed or the home environment is conducive to the reform of the children. Obviously the work of this system depends largely upon the tact, humanity, and wisdom of the probation officers, but the reform is a step in the right direction, because it recognizes the importance of laying hold of offenders early in their career, and it also takes into account the influence of home environment and social conditions in the creation of the criminal.[1]

[1] The work of the children's court in New York is thus described by the report of the clerk of that court for 1910 (New York Times, January 31, 1910):

"Its work in withdrawing thousands from the procession of paupers and criminals that press onward to almshouses and penal institutions, and making them future good citizens, entitles the court to be regarded as one of the municipality's most valuable assets. Viewed merely in the cold light of dollars and cents the test of appraisement would be the civic difference in citizenship between preying parasites and profitable producers.

"The court, in dealing with the multitude of children who come before it each year, views each as a prospective citizen, an individual potentiality for good or evil. The thought of individual salvation is ever uppermost in dealing with each child.

"If, in the best interests of all, it is possible to rescue the child without commitment to an institution, this is done and he is saved to his home and the state at the same time. Of the 11,494 children arraigned in this one court in the year 1909 only 1792 were committed to institutions, either charitable or reformatory. . . .

"The Justice presiding is prosecutor, defendant's attorney judge, and jury in one; in fact, a big father in time of greatest need to the unfortunate children brought before him. Those charged with actual offences are by law of course entitled to the benefit of counsel which they always receive, but there is no public prosecutor to hammer and harass the young defendants; nor under the law would a public prosecutor have a right to appear and prosecute.

"Where the case seems to require it, ample time is taken for an investigation of home and other conditions. Frequently it is the delinquency of the parent rather than of the child that is responsible for the latter's appearance in court. This condition being ascertained, the court directs that specific improvements be made in the home; often the child is released on parole on the condition that suitable corrections be made.

"Failure to obey, the parent is made to understand, will lead to the commitment of the child to an institution, because of improper guardianship, accompanied by an order requiring the father to pay the city for the child's maintenance while in such institution. The court in this way often improves the condition of the parents as well as the children.

Health, Tenement, and Fire Departments

With the growth of cities and the progress of enlightenment, the scope of the police power has broadened far beyond the limits of the term as understood in the old and narrow sense; and we are now creating special authorities charged with promotion of good order and public welfare through other than merely repressive measures.

First among these newer functions is the public health work which, in our enlightened cities, has grown immensely during the last decade. An increasing number of matters are now placed under the supervision of the health officers. They have control over the abatement of nuisances, the enforcement of the laws against adulterated foods, the inspection of milk, the collection of vital statistics, and the suppression of infectious and contagious diseases.

Advanced health officers now regard as within their work every undertaking that has to do with the prevention of disease, no matter whether lurking in the home, workshop, or school. They no longer think of confining their activities to the abatement of obvious and intolerable nuisances or to caring for the sick and dying. On the contrary, they recognize that "public health is purchasable and within natural limitations a community can determine its own death rate." Well-equipped departments are therefore fitted to prevent as well as cure disease. Clinics are established in schools to care for the health and teeth of children; milk stations are established where pure milk is sold at a low price, and war is waged on overcrowding in tenements and on the unsanitary conditions in factories which are so largely responsible for ill-health in great cities.

In close connection with the department of public health and sometimes forming a branch of it, is the tenement house and building department, charged with the duty of maintaining certain standards in the construction of public and private buildings with regard to light, air, sanitary conditions, and fire protection. This is one of the latest developments in American municipal administration, for, until recent years, public health and welfare were sacrificed, without protest, under the specious guise of protecting private rights. It was not until several investigations disclosed the horrible housing conditions of Chicago, New York,

and other cities that the state legislatures could be brought even to recognize the imperative necessity for action.

In this movement, New York took the lead in 1902 by establishing a tenement house department.[1] The reform has now spread to other states and a National Housing Association has been established to advocate model housing laws in every state. Such a law usually includes the following elements: Under the head of light and ventilation, the percentage of the area of a lot which a tenement may occupy is stated and the height of new tenements fixed. Under the head of sanitary provisions, a proper water supply for each apartment is ordered; and the size of rooms and the window space in each is prescribed. Owners of tenements are required to keep the courts, areaways, halls, and yards clean and to comply with the standards set up by the tenement department. A corps of officers is provided to inspect tenements periodically and to report violations of the law and the rules of the department.

Provision for fire protection is far older than tenement and building departments, but it obviously stands in close relation to them because a great deal of the enormous waste by fire in the United States is due to defective construction and the inadequate supervision of private buildings. Our fire departments have grown out of the old voluntary system.[2] In our large cities, in organization and technical equipment, the fire departments usually excell those of the greater European municipalities. The voluntary element is steadily being eliminated, the number of regulars employed increased, and the mechanical devices for extinguishing fires steadily improved. In many large cities firemen are required to pass civil service examinations, and special recognition is often given to their labors by the establishment of pensions.

As in health work, so in the protection of life and property against fire, prevention is coming to be recognized as a vital municipal function. A few large cities, like New York and Chicago, now have fire prevention bureaus charged with the study of the causes of fires and methods of avoiding them

[1] See *Readings*, p. 540.

[2] Voluntary fire companies are still to be found, however, as the sole force, or at least as an important element, in small cities and even in a number of cities of over 50,000 inhabitants.

Laws and ordinances controlling the use of inflammable materials of all kinds have been enacted; and the enforcement of these laws is placed in the hands of the inspection force of the prevention bureaus. The loose practices of insurance companies in overinsuring goods are now the subject of study and criticism, for it has been discovered in New York City that the number of fires in certain business districts depends upon the prosperity of the concerns in question. Merchants who lose in the market may recoup themselves by insuring for large amounts and starting fires in their business places. Under the insurance laws of most states, it is possible for any person to install a few dollars' worth of furniture in a dwelling or apartment and obtain at once an insurance policy for $1000 against loss by fire. This laxness on the part of companies is responsible for enormous losses every year.

Highways and Transportation

Turning now from those municipal activities which have grown out of the newer conceptions of the police power, let us examine a group of functions connected with the maintenance and lighting of streets and the transportation of passengers. It took the American people a long time to learn that a well-paved street is a decided economy for private persons using vehicles, as well as an improvement in the æsthetic appearance of a municipality; but the records of the last ten years show a revolution in this respect,[1] although there is still plenty of room for improvement. Hundreds of smaller towns which twenty-five years ago had only gravel roads are now constructing miles of brick and asphalt streets, while in the greater cities the old-fashioned cobblestone, which contributes largely to the painful noises of traffic, is being supplanted by granite blocks, asphalt, and wood. New York has literally transformed many crowded districts on the East side by the use of asphalt; Boston has laid thousands of square yards with a new kind of wooden blocks which seem to last well and certainly reduce the amount of noise connected with traffic; and Buffalo claims to be among the first cities of the world in the quality of street pavements. Some of our best private initiative and inventive genius is being devoted to the discovery of new paving materials and better methods of laying and preserving

[1] Zueblin, *American Municipal Progress*, p. 69.

pavements, and our public sentiment is being educated to protest against the slovenly streets and general negligence common a quarter of a century ago.

With this movement for better paved streets has gone a somewhat more halting movement for better methods and more thoroughness in cleaning them. Mr. Ruskin once observed that it was the duty of a city to keep the back streets clean because the front ones would take care of themselves; but this idea has not been generally observed in the United States. Most of our cities rely upon unskilled and casual day labor in cleaning their streets — only a few having learned that for purposes of public health and comfort the cleaning of streets is scarcely secondary in importance to the paving of them.

In this field of municipal activity New York has taken a leading place. In 1881, a separate department of street cleaning was established in that city, and to-day that branch of administration, in charge of a commissioner appointed by the mayor, supervises the sweeping and cleaning of the streets of the boroughs of Manhattan, the Bronx, and Brooklyn, frames regulations controlling the use of the sidewalks and provides for the disposal of refuse. A noteworthy revolution was made in the organization and methods of the street-cleaning force under the administration of Colonel Waring, a man of large military experience in the service of the United States, who was appointed commissioner by Mayor Strong in 1895. He applied to the organization of the street-cleaning force — then an army of 1400 sweepers and nearly 1000 drivers — the principle of military discipline. In spite of considerable resistance, he compelled the sweepers to wear white uniforms; he provided another uniform for the carters of ashes and garbage; and, finally, he devised a plan to secure harmonious coöperation throughout the whole force.[1] The result was astonishing; it dignified the work of street sweeping, and was a high example to the other cities of the United States.

The disposal of the wastes collected by the street cleaners constitutes a very difficult problem of city administration, for with the growth of the cities the old rough-and-ready methods of dumping in water fronts or on the outskirts have become not only objec-

[1] See *Readings*, p. 554.

tionable, but dangerous. Colonel Waring made a contribution to the solution of the problem by laying down rules to be observed by private citizens in the preparation of their wastes for disposal, which require them to separate decaying vegetable matter from ashes and waste papers, and also by establishing a plant for the reduction of the materials collected by his force of cleaners. All of our large cities now have plants for the treatment of wastes, and many of them derive considerable revenue by employing scientific methods. For example, the city of Cleveland, in 1907 collected and reduced 37,606 tons of garbage. The cost of the work was $193,365.76, but the income from the sale of the products — mostly grease — was $136,985.60, leaving only $56,380.16 to be charged to taxes.

Closely connected with the supervision of paving and cleaning the streets is the problem of lighting them; but street lighting is more than a matter of public convenience or æsthetic appearance — it is a matter of public safety, being closely related to the prevention of crime. Public lighting on a large scale was not taken up in the United States until the practical utility of illuminating gas was discovered. In 1823 a gas plant was established in Boston and two years later in New York. The system was then rapidly extended, and until the closing years of the nineteenth century American cities relied upon gas for lighting their streets. In 1880, however, the practicability of using electricity for illumination was demonstrated by the installation of an arc-lighting plant at Wabash, Indiana; and in competition with gas, electricity was easily triumphant. An investigation made in 1899 showed that there were 3032 electric-light plants in the United States as against 965 gas plants.

Most of our municipalities have relied upon private corporations to supply gas for street illumination. In 1903, only five cities, out of 175 having a population of over 25,000, owned and operated gas works, while in two cities, Philadelphia and Toledo, the works were owned by the cities but leased to private companies. Experiments in municipal ownership of gas-lighting plants in America do not appear to have been either successful or popular, although it is claimed that many advantages have been derived from public ownership and operation in Richmond, Virginia. Municipal ownership of electric-lighting plants, on the other hand, is far more common and more successful. In

1903, twenty-three out of 175 cities having a population of over 25,000, and a large number of smaller cities, owned electric plants. Among these cities were Chicago, Detroit, Allegheny, and Galveston.

Our cities cannot be contented with merely paving, cleaning and lighting the streets; they must deal with the gigantic problem of transporting thousands of passengers from place to place and from the heart of the city to the suburbs. Until 1880, the problem of transportation does not appear to have assumed any considerable importance in municipal affairs, for in that year there were only 2000 miles of single track in the United States. In 1910, New York had over 1500 miles and Chicago over 1000 miles — more than the whole country thirty years before. An inroad was made on the old horse-car lines by the cable system which was introduced in 1877; but a still greater revolution was made in 1886 when the first electric road was built.

With the increase of population it became impossible to handle the traffic by surface lines. In 1870 New York attacked the problem of congested transportation by the construction of an elevated railway, and in 1904–1920 supplemented this by subways along the principal lines of transportation. There are now in some streets express and local trains underground, surface cars going in both directions, and trains on the elevated tracks overhead. Chicago and Boston have likewise introduced elevated lines, and the latter has a subway system as well.

Practically all of the systems of transportation are in the control of private companies operating under franchises granted by the cities.[1] There is, however, at the present time a marked tendency to exercise governmental supervision over municipal systems of transportation — a tendency which is facilitated by the consolidation of the various companies through the process known as "merging." There is also a tendency to limit the franchises of street railway companies to a shorter term of years, to control the amount of capital stock issued, to require the issue of transfers, and, in some cities, — notably Cleveland, Ohio, — to force the establishment of low fares. The present status of municipal transportation companies is greatly complicated by

[1] In the construction of the New York and Boston subways, the principle of municipal ownership was introduced, but the operation was left to private companies.

the fact that their development has been accompanied by corruption, extravagant methods, and overcapitalization, which make it difficult to establish any just and equitable system of supervision and control on a purely business basis.[1]

Municipal Waterworks

Amid the multiplicity of modern municipal activities, the furnishing of an adequate supply of pure water takes high rank.[2] Its relation to the health and comfort of the people in cities was early understood; and steady improvement in safeguarding sources of supply and in the technical machinery of distribution has been coincident with the growth of our cities. To-day more than two-thirds of all the capital in municipal industries throughout the United States is invested in waterworks.

The history of public waterworks in the United States seems to run back to the establishment of a plant in Boston in 1652, but in the year 1800 there were only sixteen plants in the entire country. New York really set the example in gigantic enterprise by constructing the Croton reservoir and aqueduct, which was finished in 1842. This historic achievement was quickly followed by large undertakings in other cities, and at the close of the nineteenth century there were in operation more than 3300 plants.

With the increased facilities for supply and the modern plumbing conveniences, there has been a steady rise in the daily per capita consumption in all of our cities, which indicates a higher standard of life and is in most cities frankly encouraged by a liberal policy of charges and management. In contrast to the consumption of water in the cities of Europe, where the daily supply ran, in 1900, from 52.8 gallons in Paris to 60 gallons in Glasgow and 88.6 gallons in Zurich, the per capita consumption in the cities of the United States shows a remarkable increase — from about 100 gallons per capita to as high as 200 gallons. The per capita consumption in New York rose from 79 gallons in 1890 to 116 gallons in 1900.

This larger consumption of water is partially due to the liberal policy of waterworks management and partially to the greater

[1] For "municipal ownership," see below, p. 634.

[2] *Readings*, p. 535.

ingenuity with which modern sanitary appliances are developed in the United States. There is also a constant pressure to increase this amount, on account of the demands of the health and street-cleaning departments for enormous quantities to flush the streets and sewers. It is doubtless true, of course, that a considerable portion of the water consumed in the United States is due to neglect and leakage and other wastes — a neglect which might be overcome by the use of water meters for each private consumer; but it is generally considered better to lose a considerable amount than to check the free use of water.

Owing to the difficulty of obtaining an adequate supply of pure water for all purposes to which it may be put, the question has recently been raised as to the advisability of constructing special plants for fighting fires and flushing down the streets. Certainly a revolution could be made in the comfort of city dwellers in the summer time by the use of a copious supply of water in washing and cooling the streets.

In the construction and operation of water plants we find a more extensive and more successful application of the principle of public ownership than in the case of any other municipal utility. It seems that out of the sixteen plants in operation in 1800 all but one were under private ownership; but in 1903 an investigation of 175 cities of over 25,000 inhabitants showed that 133 owned waterworks, and fourteen of the fifteen private works in existence at the beginning of the century had since become public. The principal cities retaining the principle of private ownership were San Francisco, Indianapolis, and Omaha. It is now the almost universal practice for the smaller cities, in constructing public plants, to adopt municipal ownership; and there is a strong current in that direction in the larger cities. In New York City the principle of municipal ownership has been steadily maintained, and in 1917 the great Catskill project costing about $200,000,000 was opened for public service.

The principle of municipal ownership has made great headway because the cities have learned from practical experience that when a franchise is once granted to a private company it is difficult for the municipality to regain control, even when the terms are apparently stated very explicitly. For example, in 1868, Los Angeles, California, entered into a thirty years' contract with a private company for a supply of water, and when the city

sought to recover control at the expiration of the term, it had to wage a long and expensive battle in all of the courts that could possibly get jurisdiction over the case, and in the end was compelled to pay an enormous price for the plant and the interests of the company.[1]

Municipal Institutions for Social Welfare[2]

The functions of police administration, public supervision of transportation, and the supply of water have long been regarded as proper spheres of public activity and control even by the stoutest champions of private rights; but within recent years there has been manifested in Europe and, to some extent, in the United States a growing demand for the city to undertake a large variety of activities which were once regarded as wholly outside the field of public enterprise. This demand is not due to theory, but rather to the conditions of the modern industrial city which have deprived the inhabitants of the air, sunlight, outdoor exercise, and certainty of employment which are found in communities depending principally upon agriculture for their support. With the progress of democracy, moreover, there has come a demand for a higher standard of individual enlightenment, comfort, and welfare, even at the sacrifice of that exaggerated notion of private rights which would allow every person to do as he pleases as long as he does not positively deprive his neighbors of life and limb.

Undoubtedly a change has been coming in public sentiment in the United States during the past twenty-five years. With the opening of the West and the rapid upbuilding of our industries nearly every social right was thrust aside in the interests of those who were devoting themselves to the task of augmenting their private fortunes. Cities were laid out with little or no regard for the future, for artistic considerations, or for the comfort and welfare of the dwellers therein. The land speculator was supreme, and his ideas dominated state legislatures and city councils, except in so far as they came into conflict with other private interests seeking franchises and other municipal privileges. But at length new forces working for public good rather than for

[1] Wilcox, *The American City*, p. 46.
[2] Reference : Fairlie, *Municipal Administration*.

private advantage began to appear in our municipal life; and during the last generation there has come a new conception of a city — a conception of it as a place to live in rather than a mere market in which a chosen few may build up their private fortunes. This notion has appeared in a variety of ways, in the extension and development of popular education, in the planning of streets with regard to future welfare, in the cleaning out of slum areas, in the provision of parks, playgrounds, and recreational centres, in the construction of public hospitals and sanitariums, in the stricter supervision of the milk and food supply, and in a thousand other ways which, though apparently insignificant in themselves, show that we are abandoning our old reckless indifferentism and rampant individualism.

Many forces have contributed to this change in the current of public opinion. Through university settlements, students of social problems have come into actual contact with the sad realities which the working-class of the great cities must face. Hull House in Chicago, Neighborhood Guild in New York, the South End House in Boston, and many other social settlements have been centres of light in which those who have great influence in directing the current of public thought have been able to learn things undreamed of by the preceding generation. Private investigations into the wages and conditions of life in the great cities — investigations such as those made in Chicago and in Pittsburg — have made public concrete facts which were before the subject of speculation.

Moreover, an ever larger attention is being paid by the students and teachers of government to the problems of municipal life, and without doubt the investigations and experiments of European cities have thrown the greatest light upon our problems. One thing we have learned, above all, from England is that the unrestrained development of city life along the lines followed in the nineteenth century means poverty, physical degeneration, and positive deterioration in the moral character of the dwellers in overcrowded city areas. What boots it to develop great commerce and empire and to continue to perfect the great scientific achievements of the nineteenth century, if the heart of the nation is to decay through the physical demoralization of those who do the world's elemental work?

It is impossible to give here anything like an adequate treat-

ment of the problems of municipal government, because they are connected with those larger problems of state and national life, the study and exposition of which belong rather to the domain of political economy than to government. However, it seems desirable to make at least a hasty survey of the newer developments in American municipal life—slight and unsatisfactory as they may seem.

It is perhaps along educational lines that our cities have made their greatest advances. Although America is supposed to have adopted the principle of free and universal education early in her history, its practical application in our municipalities has been of slow evolution. The foundation of our elementary schools was, however, securely laid by the middle of the nineteenth century, and the last decades of that century showed an astounding development. From 1870 to 1899 the enrolment of children in the elementary schools (urban and rural) increased from 7,500,000 in round numbers to 15,000,000, and the percentage of school population rose from 61.45 to 69.34; and during the same period the number of male teachers advanced from 90,293 to 131,793, while the number of women employed in our public schools rose from 129,932 to 283,867. The development of high schools belongs to a later period, for as late as 1880 there were only about one-third as many students in public high schools as there were in private academies. In a little less than twenty years, however, the number of students in the public high schools increased from 26,609 to 476,227 — more than four times the number enrolled in private academies.

It is not merely in numbers that our educational progress can be measured. The advance made in the design, construction, artistic effect, and conveniences of our modern city schools can only be understood by one who contrasts a building of 1910 with one of 1850. The standards of scholarship required of teachers have also appreciated immeasurably, and the notions of popular education have extended far beyond the mere routine of the three "R's." Indeed, the schools of our cities are slowly becoming social centres; the playground and recreational features are being developed; vacation schools, affording social life to the children of the congested centres, are rapidly multiplying; and there is a constant searching among educationalists for better methods in instruction and for more effective ways for

raising through the school system the standards, not only of intellectual but of physical and moral life, in our crowded cities.

More attention than ever is now being given to the problem of how education may best fit the pupils for their tasks as bread winners and as citizens; and as a result vocational schools, designed to prepare them for efficient work in some trade, profession, or calling, are being founded all over the country. The care of the health of school children is no longer entrusted entirely to their parents; medical inspection is becoming one of the functions of the public school; and in order that the bodily ills discovered by this inspection may not go unheeded, dental and medical clinics are frequently attached to schools. For the weaker pupils, particularly those affected with tubercular troubles, open-air schools are being founded, and a few schools maintain lunch rooms where undernourished children may obtain food at a nominal cost. The old motto of a sound mind in a sound body seems about to become more than an empty phrase in the United States.

The control of education in American cities is usually vested in a board which is either a department of the city government or an entirely separate body, as in Boston, where it consists of members elected by popular vote. In New York City the board consists of seven members, appointed by the mayor and serving without salary. In several of the cities, notably in the West, the school board is an elective body standing apart from the government of the city and sometimes controlling even the raising and disbursing of the public funds for education. While it is impossible to fix upon any definite form of school authority for all American cities, we may accept the following statement, from a report of the federal Commissioner of Education, as approximating the description of a typical municipal school board:

> A board of education is created by law whose members are selected by the people, serve without pay, and have full legal power to establish and control free public schools for all children of school age within the limits of the city. Each year they make estimates in detail of the amounts of money required for the schools during the next coming year, which estimates are submitted to the city council. That body appropriates money for those purposes, named in the estimates, which they think necessary and proper in view of all the other needs

of the city government and of the expected revenue from the taxes which they think it expedient to levy. The money once appropriated is controlled by the board of education, who buy sites, build and repair schoolhouses, purchase supplies, and pay the necessary officers and teachers. They make regulations for the management of the system and employ as their executive officers a secretary and a superintendent, the former to look after the details of their business affairs and the latter to have special care of all matters relating to instruction. [1]

New York City, adopting the principle that education should not be limited merely to the young, but should be extended throughout the whole period of life, has established a system of free night lectures in the public school buildings and at other available centres. These lectures are conducted under a supervisor, acting in conjunction with the board of education. The system has been quite properly called "the people's university," for the courses of lectures offered cover every important subject in science, art, literature, history, and political economy which can be of interest, utility, and entertainment to the great body of citizens who desire to improve their intellectual attainments while pursuing their daily vocations. A special effort is made to reach the foreign population of the metropolis by lectures on American history and institutions given in their native tongues.[2] Boston, Philadelphia, Chicago, and Milwaukee[3] have followed the example of New York, though not on so large a scale; and if the system is extended, as it promises to be, the public schools will become not only institutions for the diffusion of knowledge among the people of all ages and conditions, but they will become social centres in which community interest and fraternal feeling will be developed.

Popular education in the United States is further facilitated by the establishment of public libraries. It seems that Boston led the way in this regard, for as early as 1847 the city council at the suggestion of Mayor Quincy passed a resolution asking the

[1] *Report of Commissioner of Education* (1895–96), Vol. I, p. 33. Quoted in Fairlie, *op. cit.*, p. 204.

[2] There are regular night schools in many cities for those otherwise engaged in the daytime.

[3] Rochester, New York, is probably one of the most advanced cities in the matter of the use of schools as civic centres.

state legislature for permission to open a free library supported by taxation. Nearly every northern state has followed the precedent set by Massachusetts, and with the exception of Connecticut and New York all of them have library legislation of a progressive type. Our great cities not only have public libraries well stocked with books for general reading and research work, but they have been steadily developing the system of branch libraries which makes the books available to the inhabitants of every district. Until 1902, Chicago led in the number of branch libraries and the circulation of books, but in that year Philadelphia took the lead.

Quite recently, however, New York City has made a marked advance. In the great public library at Forty-second Street and Fifth Avenue are stored the valuable collections of the Astor, Lenox, and Tilden foundations, which will give the metropolis one among the first libraries in the country. A large gift by Andrew Carnegie has made it possible for the city to erect and maintain at well-selected points no less than sixty-five branches. It is estimated that over two million books are freely at the disposal of the citizens of New York and that the annual circulation amounts to more than five million volumes. An ever increasing attention is given to the needs of children through the school libraries and through the special collections now to be found in the public libraries.[1]

Our cities are coming slowly to realize that the provision for healthful recreation for the great mass of the population is a collective function which must be undertaken by the municipality at public expense. In the provision of parks and boulevards, the cities of the United States have made giant strides within the last quarter of a century. Perhaps Boston takes first place, for, besides the famous Common and Public Garden, that city has more than seventy small parks and playgrounds, in addition to the local parks and the reservations in the environs. New York City has also given some attention to the problem of reserving breathing spaces. Almost in the heart of the city there is the famous Central Park; Brooklyn has the scarcely less beautiful Prospect Park; and to the northward New York has reserved Riverside, Washington, and the Bronx parks. Never-

[1] Zueblin, *American Municipal Progress*, pp. 173–188; *A Decade of Civic Development*, p. 120.

theless, there is still a lamentable lack of suitable provisions, it being estimated that there is only one square foot of playground for each child in the metropolis; and the large parks are nearly out of reach of those who need them most.

Every city of importance has now one or more great open spaces, but in making these provisions city governments have too often overlooked the fact that many small parks, conveniently scattered through the congested areas, are of far greater utility than wide areas on the outskirts of the city, or at best so situated that they can be reached only by the payment of car fare — an important matter for the children of the poor. Chicago, for example, recently had 700,000 people living more than a mile from any large park. The chief parks of Los Angeles and Kansas City are entirely without the city limits; and in St. Louis the large parks are all in one side of the city.[1] It must be admitted, however, that the evils of such a distribution of parks are being recognized, and some cities that have been the worst offenders in this respect have attempted to make amends within the last decade.

Cities are also endeavoring to make the parks especially attractive by providing athletic sports, such as baseball, tennis, golf, and dancing. Many give band concerts in the parks in summer time and public fêtes on holidays, that are widely advertised to attract adults as well as children. Cleveland, Ohio, for example, gave thirty-seven Sunday and twenty-six evening band concerts during the summer of 1906 in the parks, so distributed as to give equal benefits to all parts of the city. May Day, Turners' Day, Old Settlers' Day, and Orphans' Day, were the occasions of special celebrations; twenty baseball diamonds were laid out in the parks and thirty on vacant lots; and eight public playgrounds equipped with swings, sand piles, horizontal bars, and other apparatus, in the charge of athletic directors, were maintained.[2]

The physical and social value of healthful play for children is being recognized more and more by the establishment of playgrounds, not only in parks, but in connection with the public schools and at special points in the congested areas. Boston has equipped the school yards as playgrounds for children and pro-

[1] Zueblin, *American Municipal Progress*, pp. 241–274.
[2] See *Readings*, p. 546.

vided teachers to take charge of the games and gymnastic exercises. New York has followed this example, and now has a law requiring the provision of a playground with every new school building. In the winter time, Chicago, New York, Boston, and some other cities flood the playgrounds and turn them into skating rinks. Chicago has provided no less than two hundred of these rinks, lighted by electricity and open day and night.

Some indication of what an enterprising city can do is afforded by the famous experiments of the South Park Board in Chicago.[1] That board secured in 1903 from the state legislature the power to create a number of new small parks, and thereupon made a careful investigation of the recreational needs of the great congested area under its jurisdiction. Within three years the board had established fourteen parks ranging in area from six to seventy acres at an expense of over $6,000,000. Combining all of the recent devices of social settlements, kindergartens, and other recreational centres, the board sought to make these new parks as attractive as possible to children and adults, and at the same time to develop healthful recreation to the fullest extent. It accordingly provided ball fields, tennis courts, swimming pools, sand piles, swings, lagoons for rowing and skating, stands for band concerts, and outdoor gymnasiums for girls and women and boys and men. It furthermore established indoor recreation buildings equipped with shower and plunge baths and lockers, and lunch, reading, club, and assembly rooms. In the winter time, lectures, dancing, and musical entertainments are given in the assembly halls. The various recreational features are under capable athletic directors.[2]

[1] E. Poole, "Chicago's Public Playgrounds," Outlook, Vol. LXXXVII, Dec. 7, 1907.

[2] The spirit of this new movement in Chicago in behalf of physical welfare is revealed in these extracts from the private directions issued to the instructors in the South Park gymnasiums:

"Whether we wish it or not, the gymnasium and the athletic field are schools of character, but the kind of character formed in these schools will depend in great measure upon the instructor in charge. On the athletic field, and in the practice of games in the gymnasium, the instructor should praise every tendency of a boy or girl to sacrifice himself or herself for the good of the team. Show them that this is the only way to succeed — by unity of action. If you can develop this spirit, you have laid the foundation of coöperation, politeness, and good morals. You have taught the funda

Unfortunately the splendid example set by the South Park Board of Chicago has not been followed very extensively by other cities.[1] Unquestionably, however, all our cities will soon recognize play as an essential part of an educational system, and healthful recreation for adults as indispensable to the maintenance of a high standard of physical comfort and efficiency.

Cities are also recognizing to some extent the place of personal cleanliness in the general scheme of things and are making provision for public baths. The law of the state of New York makes the construction of free baths obligatory upon cities with over 50,000 inhabitants and permissible for others. In 1908, the investment of the city of New York in municipal baths amounted to $3,000,000, and eight large bathing places were in operation in the borough of Manhattan alone. Boston also has an extensive system of public baths and provides instruction in swimming;

mental lesson of thoughtfulness for others. Keep in mind that we are public servants, employed to serve the public as experts in all that our profession implies, and that we are engaged in a work which, if properly conducted, is perhaps better calculated to raise the standard of good citizenship than any other single agency in the hands of public servants.

"It is of the greatest importance that all work be undertaken in the light of the objects sought, as follows:

"First, to take children from the streets and alleys and give them a better environment and safer place in which to play. This will relieve the parents of care and anxiety —as well as truck drivers, street car men, policemen, and others who are involved in the care of children.

"Second, to encourage working boys and girls and adults to spend the idle hours in a wholesome environment and away from questionable amusements.

"Third, to encourage both children and adults to give attention to personal hygiene — exercise and bathing chiefly.

"Fourth, to furnish wholesome amusement for adults and others who do not participate in the activities of the gymnasium, athletic and play fields.

"Plan your work, then, and carry it forward with the well-defined idea that you are striving, first, to attract both children and adults to your gymnasium, play and athletic fields; second, that after you get them there you must interest and hold them until the habit of frequenting your gymnasium is established; third, that you do all you can by means of your gymnasium programme, athletics, plays, and games, to 'set up' the frame, encourage bathing, teach skill, courage, and a wholesome respect for the rights of others."

From The American City, October, 1909.

[1] New York City has endeavored to attract the people to the water front by building recreational piers above the regular docks so as not to interfere with traffic, and by providing music at these places on summer evenings.

Chicago, Buffalo, Baltimore, and Louisville, and in fact nearly all cities of any importance, have their bath-houses open all the year round. This municipal function has not been developed in the United States to the same extent, however, as in Europe, but this is largely due to the fact that the sanitary arrangements of our tenements and private houses are more advanced.

These various experiments in municipal reform, valuable as they undoubtedly are, by no means solve the most fundamental problems of modern urban life; but these problems are connected with the larger questions of poverty, industry, transportation, agriculture, and the development of our natural resources — questions which fall within the domain of economics rather than of government strictly speaking. Nevertheless, it would give an entirely mistaken notion of the nature and scope of government to pass over without notice some of the more purely municipal issues.

At the outset there is the grave problem of overcrowding, which has reached such an alarming condition, that in New York City the death rate, 16.5 per thousand in 1908, was higher than in Berlin or London, where it was 15.4 and 13.8 per thousand respectively. It is now well established that the death and sickness rates fluctuate with the wages and home conditions of the people.[1] It is authoritatively stated that the "annual economic waste from preventable diseases in New York City ranges from $37,000,000 to $40,000,000," and this is largely due to overcrowding. Furthermore "the density of population increases with the decrease of wages and overcrowding is greatest where wages are lowest."

The land question of the city takes, therefore, first rank at the present time. It is a well-known fact that the value of ground in our large cities increases with astonishing rapidity — not through the effort of the owners or of any single private individual, but through the growth of industry and population. The following figures, showing the appreciation in the value of the land alone in certain New York City blocks, illustrate this statement in a concrete way; and it must be noted that these blocks are not within the very heart of the city where the pressure of the population is greatest: —

[1] Rowntree, *Poverty* (London, 1901), and Hunter, *Poverty* (New York, 1904.)

Block	Land	
	1904	1908
8125 w	$367,500	$456,000
9125	529,600	796,700
9125 w	182,000	229,000
9130 w	170,900	234,000
9131 w	278,000	469,500
10124	549,000	782,700
10125	540,500	776,000
10126 n.e	449,600	576,200
10127 n.w	122,000	290,400
10131 e	222,000	357,500
10132 e	257,000	403,000
10133	421,000	634,700
11132	261,000	383,000

Average appreciation 46.86 per cent.[1]

The recognition of the fact that an enormous annual tribute of "unearned increment" is paid to the owners of city lands without any service in return on their part has led a group of reformers, known as the "single taxers," to advocate the diversion of this money to the public treasury by way of taxation. Mr. Henry George, who was the founder of this movement in America, declared that this single tax absorbing all unearned increment in land values would "raise wages, increase the earnings of capital, extirpate pauperism, abolish poverty, give remunerative employment to whoever wishes it, afford free scope to human powers, lessen crimes, elevate morals and taste and intelligence, purify government, and carry civilization to yet nobler heights." Without sharing this generous hope or examining the several objections which may be brought against the rigid application of the single tax doctrine, one may certainly conclude, with Professor Seager, that a gradual increase in the proportion of the municipal taxation that falls on land, as distinguished from improvements and different forms of personal property, is much to

[1] H. B. Woolston, *A Study of the Population of Manhattanville* (Columbia University Studies), p. 155; the table is based on the official assessors' lists.

[2] Seager, *Economics: Briefer Course*, p. 434.

be desired.[2] "There is reason to think," continues Professor Seager, "that especially in large cities [1] absentee landlordism is becoming more and more the rule for the simple reason that more and more people are coming to live in tenement and apartment houses. If this is the case there may be good ground for the contention that the system of private property in land is ceasing to serve any useful purpose in cities which the system of public ownership would not serve as well, and that the time is ripe for a gradual transition to the latter." [2]

The land question is involved in another fundamental problem, — how to plan a city with a view to its future growth, the health, comfort, employment, and standard of life of all of the inhabitants.[3] The use of a little foresight, the adoption of a sound public policy, and a greater disregard for that clamor which would transform every public utility into private property would have saved the lives of countless thousands of city dwellers in the United States and would have made the living conditions to those who survived infinitely more tolerable. Every day that social control over city planning is delayed makes more difficult the problem of securing to the people the social values created by the growth of cities, and of providing proper air, light, and sunshine for the city dwellers — in a word, the great problem of making the city a place where the standard of physical efficiency, upon which in the long run the very existence of the nation itself de-

[1] Table showing the percentage of inhabitants of great cities owning their own homes.

Cities	Owning Homes	Free from Mortgage
Baltimore	27.9 per cent	20.5 per cent
Boston	18.9 " "	9.2 " "
Buffalo	32.9 " "	15.8 " "
Chicago	25.1 " "	11.9 " "
Cincinnati	20.9 " "	13.9 " "
Detroit	39.1 " "	22.5 " "
Indianapolis	33.7 " "	18.1 " "
New Orleans	22.2 " "	19.1 " "
New York City	12.1 " "	
Manhattan and Bronx	5.9 " "	2.3 " "
Philadelphia	22.1 " "	12.1 " "
San Francisco	24.1 " "	16 " "

Goodnow, *City Government in the United States*, p. 15.

[2] *Economics: Briefer Course*, p. 434.

[3] Goodnow, *Municipal Government*, p. 332 ff.

pends, may be maintained at the highest point. There is no room here to dwell at length upon this important and technical branch of public economy. Whoever doubts the part that will be played in the future by scientific city planning may compare the broad avenues and streets of Washington with the narrow, dark, dismal, and crooked lanes of the older parts of Boston and New York.

In recognition of the many advantages to be derived from a scientific planning for the future growth of cities, a few states have authorized their municipalities to create regular permanent commissions for this purpose. It is usually the duty of a planning commission to study the topography of the city, its parks and playgrounds, the location of public buildings, terminals, and waterfronts, congestion and transportation, and kindred matters.[1]

Municipal Ownership

In connection with the extension of the activities of the municipality, has arisen the question of how far these functions should be given over to private companies and contractors and how far they should be conducted by municipal authorities themselves. Street railways, gas, electric light, and water plants, and many other municipal utilities are in the nature of things monopolies, so that competition seldom enters as a factor in regulating prices and services. For example, it is clear that there can only be one street car line on any street and the company which owns any such line, if free from public control, may fix any charge which the "traffic will bear."

In the beginning of our municipal history the nature of municipal monopolies was not understood by state legislators, or, if understood, it did not deter them from bestowing almost priceless public privileges, without restrictions, upon private interests. The story of these franchises and the corruption connected with them makes one of the most sordid pages in the history of our country; but fortunately within the last decade there has come a gradual awakening of public sentiment on the question, and the day of free and uncontrolled exploitation of municipal monopolies seems to be about past.

An examination of the present methods of conducting munici-

[1] Beard, *American City Government*, chap. xiv.

pal utilities reveals three general modes: (1) Private ownership under public regulation; (2) public ownership with private operation; and (3) public ownership and operation.

Where municipal utilities are in private hands they are operated under franchises granted by some municipal or state authority.[1] On the whole there is a marked tendency in the direction of making the grant of important franchises dependent upon popular vote. This is the system which prevails where the initiative and referendum are in force.[2] There is also a tendency to limit the term of all franchises, issued to private companies, to short periods of years, varying according to the importance of the utility. In general, the term of twenty-five years seems to be the most popular. It has become customary, furthermore, in the granting of franchises, to place the private company under some close restrictions as regards charges and the character of the service rendered; and it is now the common practice for the municipality to require some kind of compensation either in services, cash payment, or annual rental.[3] Even the most conservative students of municipal government are agreed that the old policy of non-interference is obsolete.[4]

Wherever public ownership is combined with private operation, the municipality leases its plant to some corporation, and stipulates certain standards as to services and charges. This is quite common in cases where the undertakings are so large and returns on the investment so uncertain that private capitalists are unwilling to finance the enterprise at all or except under onerous conditions. Examples of this method of dealing with municipal monopolies are afforded by the waterworks system of Denver and the subways of Boston and New York.

The third method of dealing with municipal utilities — public ownership and operation — is far more frequently employed in Europe than in the United States. If we leave out of account the

[1] Several of the states have forbidden the state legislature to grant franchises in cities.

[2] Above, p. 597.

[3] The recent Cleveland street railway settlement which limits the company to a net earning of 6 per cent on the capital and at the same time gives the city strict control over service, extensions, and increase of capital is an interesting example of public regulation.

[4] *Readings*, p. 548.

water plants and the small electric-light plants owned and operated by American cities, we may say that the principle of municipal ownership has secured no general acceptance. Doubtless the general view current in the United States is well represented by the report of a commission on public ownership appointed by the National Civic Federation in 1907.[1] That commission came to the conclusion that municipal ownership of public utilities should not be extended to revenue-producing industries not involving public health, safety, and transportation, or the permanent occupation of public streets or grounds. It is generally held that owing to the corruption and inefficiency of so many of our city governments no sort of public business on a large scale can be successfully operated directly by municipal authorities. How far this view represents the mature judgment of people who have given the matter any thought and how far it is an opinion advanced by the private interests opposed to the extension of municipal ownership it is, of course, difficult to determine.[2]

It is certain that most of the corruption in American city government has been connected with the exploitation of public franchises by private corporations. It is undoubtedly true, also, that "politics," in the bad sense of that word, is mixed up as much with private ownership as with public, and the career of some of the New York transit companies will compare in mismanagement and dishonesty with the career of the Philadelphia gasworks under the ownership and operation of the city.[3] Indeed, it is argued by advocates of municipal ownership and operation that the danger of corruption is by no means so marked in connection with public ownership as with private ownership.[4] They hold that the greater responsibilities associated with public ownership will attract a higher quality of men to our municipal governments; that in proportion as the city, through public ownership, touches directly the lives of its citizens, popular in-

[1] *Readings*, p. 548.

[2] For an excellent example of the way in which interested corporations may use modern publicity to discredit municipal ownership, see the Progressive Age for November, 1907 — an article on "Municipal Ownership in New York City."

[3] See Bryce, *American Commonwealth*, Vol. II, chap. lxxxix, and *Readings*, p. 552.

[4] See *Readings*, p. 550.

terest in its government and administration will be increased; that a higher standard of labor conditions may be established; and that only public ownership and operation will secure that control necessary to make the various municipal enterprises render adequate services.

It may be doubted, however, whether arguments in the abstract on this question of municipal ownership are of any practical value. Most opinions which we now have rendered as to the respective merits of public and private ownership are merely *ex parte* statements. It may be said with safety that in some places municipal ownership and operation have succeeded remarkably well and that in other places, notably in Philadelphia, municipal ownership is connected with corruption and inefficiency. No general conclusion seems possible at the present time except that municipal ownership will not succeed in any city unless high standards of civil service are established and there is a large and influential group or class permanently and deeply interested in the economical and efficient management of the enterprise in question. Municipal ownership, therefore, is in itself not good or bad; its success depends upon the standards and ideals of the community in which it is tried.

CHAPTER XXIX

LOCAL RURAL GOVERNMENT [1]

THE differences in local institutions throughout the United States have been so often emphasized by writers on American government that it seems well at the outset to indicate certain fundamental principles common to them all. The first of these is that our local communities enjoy large powers of self-government through elective officers, and in the exercise of these powers are only slightly subject to the supervision and control of the state administrative officers. In the second place, the states, with one exception, are divided into counties,[2] and counties are in turn divided into towns, townships, or districts of one kind or another. Every county, and generally speaking every subdivision of a county, is a unit for certain financial, judicial, police, and local improvement purposes which are usually carried out by elective officers and boards. In the third place, subject to the few general provisions in the commonwealth constitution, the county and its subdivisions are under the absolute control of the state legislature, which can create and abolish offices, distribute functions among the various authorities, and in other ways regulate by law even to the minutest detail the conduct of local government.

The divergences that occur among the states in local institutions may be ascribed to the manner in which local functions are distributed between the authorities of the county and of the town or township and to the manner in which the inhabitants of the county subdivisions participate in the conduct of their local matters. On this basis of differentiation our states have been classified into the three famous groups: (1) those of the New England type in which the town and its open meeting overshadow

[1] In the preparation of this chapter extensive use has been made of the scholarly work by Professor Fairlie, *Local Government in Counties, Towns, and Villages*, to which the student is referred for further details.

[2] Louisiana is the only state in which the district is not known as the county. There it is called the parish.

in importance the county; (2) those of the South in which the township is absent or appears only in the most rudimentary form; and (3) those of the middle type, like New York and Pennsylvania, in which the town, or township, as it is sometimes called, has a large and important place, but is subordinate to the county administration. These three types of local government, which will be described in due time, have been carried westward roughly along parallel lines and have formed, with varying emphasis, the basis for the development of local institutions west of the Alleghanies.

The County

The last census reported 2852 counties in the United States, varying in size from the county of Bristol in Rhode Island, embracing twenty-five square miles, to the great county of Custer in Montana covering more than twenty thousand square miles. A majority of the counties, however, range between 300 and 900 square miles in area. The divergences in population are even greater, for at one end of the scale we have New York county, the heart of the metropolis, with more than two million inhabitants, and at the other end, small rural counties with a few hundred residents widely scattered. Even within the same state there may be the greatest divergences in area and population. Kings county in New York has seventy-two square miles and St. Lawrence county 2880 square miles; Hamilton county has only 5000 inhabitants, and Schuyler about 15,000. Delaware has three counties, Massachusetts fourteen, New York sixty-one, and Texas 243. Every county has a county town, which is the seat of the offices of administration. In every state except Rhode Island, there is to be found a county board [1] in charge of certain matters of finance and administration, and every county has a group of officers connected with the administration of justice, police control, finance, and miscellaneous matters. Besides being a unit for the satisfaction of purely local needs, the county is also a subdivision of the state for the discharge of many central functions, especially in connection with finance and elections.

Let us examine first the county board. From the point of view of organization, county boards may be divided into two general classes: (1) the small board of three or more members

[1] The Louisiana parish also has a board.

elected at large for the whole county or from large districts, and (2) the representative board composed ordinarily of one member elected from each township within the county. The former type prevails generally in New England, the South, the Middle West, and Pacific states; the latter type is to be found in New York, New Jersey, Michigan, and a few other states.

Each of the two types of county board, the small board and the large representative body, has its peculiar advantages. The former can readily meet oftener, transacts business with more facility, and can, with more certainty, be held responsible for the due discharge of its legal duties. The latter is more representative in principle, affords fewer opportunities for collusion among the members, and partakes more of a deliberative character. In point of fact, however, both systems have been severely criticised as wasteful, inefficient, and sometimes corrupt; and several attempts have been made to institute other organs of local government to check and control the county board. For example, in Indiana, the legislature has superimposed on that board a county council invested with the important local financial functions.[1]

The failure of all schemes of control to secure efficient county administration, especially in thickly populated districts, has led to a demand for three types of reform: (1) the consolidation of city and county administration; (2) the adoption of the commission-manager plan now so extensively used in cities; and (3) the establishment of county home rule. The County Government Committee of the National Municipal League declares that no effort should be made to invent new checks and safeguards on the old system but that the principle of the short ballot and simplified administration should be applied.[2]

The functions of the county board generally fall into five classes: the levy of taxes and appropriation of local funds, the maintenance of roads and highways, the construction and care of county buildings, the relief of the poor, and the control of elections.

The powers conferred upon the county board by the state

[1] *Readings*, p. 561.

[2] *American Year Book* (1917), p. 188; C. C. Maxey, *County Administration* (1919).

constitution or by legislation are usually enumerated or at best very narrowly confined. This results in the necessity of going to the state legislature for innumerable special acts at every session; it destroys "home rule," and helps to introduce confusion into state legislative business.[1] The new Michigan constitution of 1908 continued an old provision authorizing the legislature to confer legislative powers on the county boards of supervisors, and by a later enactment the board was given full power "to pass such laws, regulations, and ordinances relating to purely county affairs as they may see fit, but which shall not be opposed to the general laws of the state and shall not interfere with the local affairs of any township, incorporated city, or village within the limits of such county." Laws passed by the board under this act may be vetoed by the governor, to whom they must be submitted, but they may be repassed over his veto by a two-thirds vote.[2] This should have a salutary effect in reducing the pressure for special laws in the Michigan legislature.

A far more radical step in the direction of home rule for counties and the reorganization of county government along more efficient lines was made in California in 1911 by the adoption of a constitutional amendment empowering counties, through boards of free holders, to frame their own charters or plans of government and on popular approval to put the same into effect. Steps to establish home rule under this provision may be taken by the county board of supervisors or may be initiated on petition of fifteen per cent of the voters. The charter drafting board is elected by popular vote and it is authorized under the state constitution to make a substantial revolution in county government — in the nature of many of the county offices, the methods of choice to fill them, and in the functions which the county may undertake. The charter as drafted by the board must be approved by popular vote and also by the state legislature.

The first county in California to adopt the new plan was Los Angeles county which approved a new scheme of local government in November, 1912. The elements of the Los Angeles scheme are as follows:

[1] See above, p. 530.

[2] Professor Fairlie, in the American Political Science Review, for February, 1910, p. 122.

A commission form of government, in the form of a board of five members, in absolute control of county affairs.

The appointment by this board of all county officers, excepting the assessor, auditor, and district attorney.

Creation of new offices, including corporation counsel, a purchasing agent, superintendent of charities, and a public defender.

Appointment of three civil service commissioners by the board of supervisors.

The creation of the office of road commissioner with full power to manage the road system of the entire county under the direction of the board of supervisors.

The county board is always supplemented by a series of public officials varying in number and in the distribution of powers from state to state; but the two leading groups of such offices — those connected with justice and police and with finance — are of course always present, owing to the fact that these functions, to a greater or less extent, everywhere form a part of county administration. These offices, or at least the duties attached to them, are generally determined by the state legislature under very slight constitutional control, and each incumbent is usually independent in the discharge of his duties, being subject only in a few instances to supervision by the county board or by the state administrative authorities. It is the common rule also to have these offices elective, but there are a number of exceptions, especially in the matter of judicial officers in the eastern and southern states.

The practice of having a separate judge and court for each county obtains in only about one-third of the states, while some other states have separate courts for the more populous counties. The more common rule is to group counties into judicial districts and have one judge go on circuit from county to county, holding stated sessions of court. In about three-fourths of the states all judges, district and county, are selected by popular vote for varying terms — often six to twelve years. In other states they are selected by the governor in conjunction with a council, the senate, or, as in Connecticut, the entire legislature. In three commonwealths, Rhode Island, Vermont, and Virginia, they are chosen by the legislature. Sometimes there is associated with the county judge a special officer, usually known as the probate judge, who

is charged with the settlement of estates. In New York there is a county judge elected for a term of six years,[1] and in a majority of counties there is a surrogate or probate judge, also elected for six years.[2]

The jurisdiction of the county court, that is, the range of matters which may come before county court judges, of course, varies greatly from state to state. In a few states, the county court has no judicial functions at all, but is merely an administrative organ; in two states, Kentucky and Tennessee, it possesses both judicial and administrative functions; and in some others the duties of a county court are confined to probate business. The county court of New York has jurisdiction over all civil cases involving not more than $2000, and over all criminal cases, with the single exception of murder.

Next in importance to the judicial officers of the county is the prosecuting attorney, known in New York as the district attorney and in some other states as the county attorney.[3] He is generally an elective officer and is charged with the institution and conduct of criminal prosecutions and with representing the county in civil suits. He usually has the power of appointing assistant prosecuting attorneys for the various localities within the county. Sometimes he derives his salary from fees — a device which furnishes an incentive to activity; but it is discarded by many states in favor of a fixed salary because it may encourage useless prosecutions. In New York the district attorney for each county, with a few exceptions, is elected for a term of three years; and it is his duty to conduct all prosecutions for crimes and offences committed within his county, except when the trial of an indictment is removed from his jurisdiction, in which case he must assist the neighboring district attorney in the trial of the case if requested.

The chief business of the prosecuting attorney is, of course, the enforcement of the law against criminals of every kind — from the petty thief to the murderer or the defaulting or dishonest public officer. Clearly, therefore, the good order of the commu-

[1] There are exceptions for counties containing, or embraced by, cities.

[2] There is always attached to the county court a clerk who keeps the judicial records and sometimes has miscellaneous functions in addition; see above, p. 549.

[3] This latter term is applied in some states (including New York) to an attorney appointed to represent the poor in courts.

nity and the efficiency of the government depend in a large measure upon the character of the prosecuting attorney; and it is small wonder that heated political contests are sometimes waged in the selection of the man to fill this position. There is nothing so important to a corrupt county or city political machine as the office of the prosecuting attorney, for it is practically within his power to decide whether corruption and malfeasance shall exist in the various departments or not.[1] Effective work as prosecutor has brought many men into great prominence, especially in recent years when municipal scandals have been so widespread. Mr. Deneen's services as prosecutor in Chicago opened the way to the office of governor for him, and Mr. Folk's vigorous search for criminals in St. Louis helped to make him governor of that state. The dramatic career of Mr. Heney in San Francisco made him a national figure.

The prosecuting attorney, however, does not have sole control over the institution of criminal proceedings, for in most states it is the grand jury that takes the preliminary steps in hearing evidence and bringing the indictments. The prosecutor has no legal power to force or prevent action on the part of the grand jury; but, as a matter of common practice, he determines what cases shall come before the grand jury, and his advice as to the proper line of action is generally taken.

The recognition of this fact and the discovery that the grand jury is a slow and unwieldy instrument for prosecution have led several states to abandon it altogether for ordinary cases and to authorize the institution of criminal trials on "information" presented by the prosecutor. There are, of course, grave dangers in substituting the will of a single official for the deliberate judgment of a group of citizens, and the constitution of Oklahoma, while permitting prosecution by information, provides that "no person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination."[2] The restriction of the use of the grand jury, furthermore, increases enormously the power of the prosecutor, happily if he uses it for good, disastrously if he is associated with the criminal elements.

[1] See Goodnow, *Principles of the Administrative Law of the United States*, p. 416.

[2] *Readings*, p. 87.

The executive officer of the county is the sheriff, who is elected by popular vote in every state except Rhode Island, where he is chosen by the legislature. The sheriff always has power to appoint one or more deputy sheriffs. The term is usually two years, but in some states, including New York,[1] it is three years, and in a few it extends to four years. The sheriff is paid either a fixed salary or by fees or by a combination of both ; and in New York county the income secured by the sheriff under the fee system formerly amounted to $75,000 or more. The sheriff is custodian of the county jail; he is the county hangman; he summons witnesses, arrests indicted persons, sells the property of private persons for taxes or debt under judicial order, and executes the processes of the court.

The sheriff is also conservator of the peace in the county, that is, he may "upon view, without writ or process, commit to prison all persons who break the peace or attempt to break it; he may award process of the peace and bind any one in recognizance to keep it. He is bound, *ex officio*, to pursue and take all traitors, murderers, felons, and other misdoers and commit them to jail for safe custody. For this purpose he may command the *posse comitatus*, or power of the county; and his summons every one over the age of fifteen years is bound to obey." [2] This power is of great significance in time of peace and of special importance in the case of disorders.

The sheriff is to a large extent the guardian of life and property. The zeal or laxity with which he takes precautionary measures will often determine the seriousness of a local disturbance; and there are many instances of sheriffs allowing their fears or sympathies to outweigh their strict obligations to execute the law. Indeed, in many of the unsettled communities, the contest over the election of sheriffs is waged with great vigor on account of its relation to the suppression of disorder. In serious disturbances, however, the governor of the state may take the police control temporarily out of the hands of the sheriff by declaring martial law and using state troops.[3] He may do this, of course, at the request of a sheriff unable to maintain order with the ordinary resources at his command.

[1] Exceptions for certain populous counties.

[2] South *v.* Maryland, 18 Howard, 396, quoted in Fairlie, *op. cit.*, p. 109.

[3] See *Readings*, p. 449.

In a few states the law enforcement work of the sheriff is supplemented by a state police force or constabulary. Pennsylvania and New York have such agencies. The force is organized on military principles and is under the direction of the governor. It is frequently used in Pennsylvania in labor disputes.

Closely associated with the office of sheriff is that of the coroner, an office not quite so ancient, but nevertheless with a long and interesting history. There are usually two or more coroners in a county, and, except in a few eastern and southern states, they are elected by popular vote.

It is the duty of the coroner to view the body of any person murdered, or killed by accident, or in any other manner involving suspicion of crime. The inquest is made by a jury, generally of six, empanelled by the coroner; witnesses are summoned; all facts relating to the death of the person which can be ascertained are recorded; and at the conclusion of the inquest the jury returns a verdict to the effect that the deceased met his death in some particular manner and, when foul play is unearthed, the offender or offenders may be named.

In New York the coroner may employ two competent surgeons to make post mortem examinations and to testify to the result of the same, and it is the common practice in all states to call some medical authority to give testimony at an inquest. Owing to the value of such evidence and the crude and ignorant methods often accompanying coroners' inquests, Massachusetts has provided for the appointment of expert medical examiners to give special attention to these important preliminary investigations. The coroner's verdict does not in any case, however, prevent independent action by the county prosecutor or grand jury.

In addition to the judicial and police officials of the county, there is a second important group, which may be designated as the financial officers. They are generally elective. First among these is the treasurer,[1] who is to be found in every state except Rhode Island. His duties are primarily fiscal in character; he collects the taxes laid in the county, but sometimes he is assisted in this by special collectors; and he transmits to the central au-

[1] In Connecticut, Vermont, New Jersey, Kentucky, and Louisiana treasurers are appointed by county boards and in South Carolina by the governor. Fairlie, *op. cit.*, p. 122. In New York the term of the treasurer is three years, except in certain populous counties.

thorities the portion of the local revenues which goes to the state. He is the guardian of the county funds, and in many states he may select under the terms of the law the banks in which to deposit the money under his control. In the exercise of this power he often derives a large personal income, but some states have now required the officer to turn into the county treasury all interest accruing from deposits of public money. The law of New York orders the treasurer, if not otherwise directed, to designate in writing the banks in which county funds are to be deposited and to agree upon the rate of interest, which is to be credited to the account of the county. Of course, this leaves opportunity for favoritism, which will be advantageous to the treasurer, and there has been more than one case of private gain at public expense.

About one-third of the states, principally in the North Central group, have county auditors whose business it is to go over the accounts of all the officers of the county, to prepare a periodical statement of the county finances, and to issue warrants on the treasurer.

Until a few years ago, it was the common practice to allow county auditors to keep their books in almost any fashion, and as a result all kinds of irregularities crept into county finances. In fact, the corruption in county administration was relatively as great as in city governments. In the opening years of the nineteenth century, legislatures began to enact laws providing for state supervision of local finances. Ohio, Indiana, Iowa, New York, Massachusetts, California, Michigan, and Wisconsin have established systems of state control over local finances. The system in California, for example, embraces a board of control, a staff of expert accountants, a uniform system of accounting and reports "for all officers and persons in the state who have the control or custody of public money or its equivalents," and finally a scheme for auditing local books.

In a number of states, especially those in which the township is only slightly developed, notably in the South, there is a county assessor who is usually elected. It is his duty to make out the roll of all the taxpayers residing in the county and the value of property assessed against each person. Quite generally the taxpayers list their own property for the information of the assessor, but, of course, he may alter each valuation as he may see

fit. Associated with the assessor there is sometimes a board of equalization, whose duty it is to pass upon the assessments of the entire county with a view to correcting inequalities, and to hear appeals from taxpayers protesting against the valuation assigned to their property. In New York, this work of equalization is done by the board of supervisors, who may, however, by majority vote, appoint three persons to be commissioners of equalization of the county.

In addition to the financial, judicial, and police groups of county officials, there are a number of officers connected with county administration. In almost one-half of the states there is a county clerk, who sometimes combines duties connected with the county court with entirely separate ministerial duties, such as keeping records of deeds and mortgages, or preparing ballots for elections. The county clerk in New York is elected for a term of three years;[1] he serves as the custodian of election records, in all except the most populous counties, which have special authorities for this purpose; and he generally prepares ballots for primary and regular elections.

The custody of the records of land is a county function in all the states except Connecticut and Rhode Island, where it is vested in the town clerk. In about half the states, the county has a special officer in charge of land records, known as a recorder or the register of deeds, who keeps a record of all titles to land within the county and of all mortgages, loans, and other instruments which affect such titles.

Everywhere, except in New England, certain educational functions are made county matters; and in a number of the southern states the management of schools is entirely in the hands of county authorities composed of boards and superintendents. In states where education is largely a township matter, as, for example, in Indiana, there is a county superintendent of education who has general supervisory powers over the trustees or directors of local school districts. In New York there is a school commissioner elected in each school commissioner district, of which some counties have two or more; in cities, however, there are special boards.[2]

[1] In rural counties; special provisions are made for large cities.

[2] Among the minor county officers may be included the surveyor, to be found in nearly all the states except the North Atlantic group, the superintendent of the county poor, and the health commissioners.

Town and Township Government

On the basis for classifying local governments laid down at the opening of this chapter — that of the organization and functions of the subdivisions of the county — the New England states stand in a group by themselves. In that section of the Union, every county is divided into towns, or, to use the word in a western sense, townships. Many diverting attempts have been made to trace the origin of these rural hamlets to that "great cradle of liberty, the forests of Germany," and as a matter of fact they do have a very long and interesting history. They have stood practically unchanged, especially in the more sparsely settled districts, in their form of government amid the political revolutions of the nineteenth century.[1] It is customary to call them pure democracies because they are governed by assemblies of all the voters in open town meetings, and possess most of the important powers which are elsewhere vested in county officials. Yet it is difficult to regard as democratic a system which is the basis for abuses in representation in the state legislature almost as gross as those swept away in England by the first great reform bill.[2]

The New England towns are very irregular in shape, owing to their having been originally settlements laid out roughly before an official survey was made. Generally speaking, they vary in size from twenty to forty square miles, although the western rectangular township of thirty-six square miles is found in the northern part of Maine. The town is usually a rural region containing one or more "villages," varying in size from very small hamlets to settlements containing three or four thousand inhabitants. The more thickly populated urban centres are usually organized as city corporations distinct from the town, but this is not always the case. The town of Brookline, Massachusetts, between Boston and Newton, has a population of over 20,000 and yet retains its primitive town government. Even New Haven and Hartford, Connecticut, have continued the town organization separate from the city government. The feature of the system which is most striking to the observer from the middle West is

[1] Compare the extracts on p. 11, and on p. 556 of the *Readings*.

[2] See above, p. 521.

the combination of rural with municipal government; for in most instances considerable villages and even small cities, containing a thousand or more inhabitants, are not separated from the surrounding agricultural district, but the whole of the "township" is governed by one meeting of all the electors, rural and urban.

The government of the town is vested in a town-meeting composed of all the voters and held annually and on special occasions. The meeting commonly assembles in the town hall and seems to be attended by a considerable proportion of the voters, especially in the rural regions. At the town-meeting the selectmen, or executive committee, the town clerk, assessor, treasurer, constable, and other officers are chosen by secret ballot, and matters relating to appropriations, streets, schools, and other local functions are discussed and determined. In rural districts where primitive conditions have been undisturbed by the rise of the factory system or by the influx of immigrants, and where every one knows everybody's business, the town-meeting preserves much of its ancient vitality and interest, but to a considerable degree the business of the meeting is determined in advance by a caucus of the adepts in rural politics.[1] It is only when there is some matter of special importance, like the laying out of an important street or the erection of a new school building or waterworks, that the town-meeting rises to the dignity of a deliberative assembly.

The administrative work of the town is done by a group of officers elected for terms of one or more years at the town-meeting. The chief executive officers of the town are the selectmen, varying in number from three to nine. Their emoluments and the character of their duties are largely determined by the size of the town. They may execute the special orders of the meeting, lay out highways, draw warrants on the town treasury, act as assessors, health officers, and election clerks, and grant licenses. The town clerk is an important and often an interesting character, for his knowledge of local matters and family histories is sometimes stupendous. He issues marriage licenses, serves as a registrar of marriages, births, deaths, records the proceedings of the town meetings, and in Connecticut and Rhode Island is a recorder of deeds, mortgages, and other documents relating

[1] See *Readings*, p. 12, for the Boston caucus in colonial times.

to land titles. The funds of the town are guarded by a treasurer, and sometimes there is an auditor to supervise all accounts. The peace of the town is in the keeping of the constables, who often have other duties, such as the serving of writs and the collection of taxes. Except in Massachusetts and Maine, where they are appointed, justices of the peace are elected at the town meeting. There are in addition numerous other minor officers, such as poor guardians, pound-keepers, library trustees, and fence-viewers, sometimes elected, and sometimes appointed by the selectmen.

In a great group of northern and central states the town, or township as it is often called, has a position of importance in the county; but there is scarcely anything of the feeling of intense localism which has made the town such a vital part of the New England system. In New York, New Jersey, Michigan, Illinois, Wisconsin, Minnesota, Nebraska, North and South Dakota, for example, the town-meeting with considerable variations has been adopted, but its functions are by no means so numerous, and with few exceptions the voters do not take the same lively interest in its proceedings. In Pennsylvania, Ohio, Indiana, Iowa, Kansas and Missouri there is no township assembly at all, the local business being transacted by elective officers.

This decline or disappearance of the town-meeting is principally due to the fact that in most cases the township is an artificial unit laid out by the surveyor, not a settlement of neighbors and friends such as we find in New England. In the middle western states, the county organization came first, when the regions were only sparsely settled, and it has retained most of the functions assigned to it in the beginning. The western states, furthermore, were settled by immigrants from all parts of the East and from Europe, and the conditions were wanting for that spontaneous coöperation which naturally arises among men closely associated in long historical traditions. It must be remembered also that in this group of states the more populous urban centres are cut off from the rural regions by special village or city organization, thus leaving only the scattered farmers to conduct their rural affairs by themselves.

In most of the states which have established the town-meeting the authority of that body is by no means so great as in New England, although in New York it theoretically enjoys sub-

stantial local powers. In that state the meetings are held biennially,[1] usually on the general election day in November and at other times on special call for particular purposes. The town assembly elects at its biennial meeting one supervisor, one clerk, the justices of the peace, the assessors, one collector, one or two overseers of the poor, two or three commissioners of the highways, and not more than five constables. The meeting may also make provision for abating nuisances, destroying noxious weeds, establishing "pounds," and caring for town property, and it may vote money for town purposes; but an elector of a town cannot vote upon any proposition for the raising or appropriation of money or incurring any town liability unless he or his wife is the owner of property in the town assessed upon the tax roll.

As a matter of practice, however, the town-meeting of New York in a large number of cases is merely an election, the government of the town being conducted by the town board, consisting of the supervisor, town clerk, and the justices of the peace. The board audits accounts and allows claims and demands against the town. The general statutes of the state relating to town government cover about one hundred and fifty closely printed pages and go into such detail that they leave no deliberative functions of any importance. Financial functions connected with the establishment of sewers, waterworks, and lighting plants are exercised by the town board, acting in some instances on petition of the taxpayers and in others on a referendum to the voters. The direction of the raising of money to meet town charges, however, is vested in the county board of supervisors.

This decline of the town-meeting is to be found among all those states which have adopted the system. As the townships grow more populous, the local duties to be performed become more complex and the state legislation controlling the details of local government increases in bulk. It is inevitable, therefore, that the voters should come to rely more and more on boards and officers devoting their time to particular duties.

In those states which do not have township meetings the local functions are vested in elective officers, such as trustees, clerks, assessors, treasurers, justices of the peace, and constables. These

[1] In a number of towns the general meeting is abandoned altogether and the voters assemble in election districts to choose town officers.

officers are charged with certain definite duties by statute, and there is no occasion for by-laws and debate. In Indiana, for example, the most important officer is the trustee, who prepares the township budget, supervises the common schools in rural districts, and, generally speaking, occupies the place of the town board in New York or the selectmen in New England. However, an attempt has been made in that commonwealth to establish a larger popular control over the trustee by the creation of an elective board of freeholders to supervise his financial activities.[1]

The subdivisions of the county in the South and Far West need not detain us long, for they are generally of slight importance historically or practically, and attempts to introduce the township system of the North and East have not been at all successful.[2] In some of the southern states the county subdivisions are known as magisterial districts, in others as election districts or precincts. These divisions are quite frequently used as the units for electing justices of the peace, constables, and members of the county board or for school administration. The voting of appropriations and general functions of administration vested in the New England town-meeting are in the South and West vested in the county board. The Virginia county, for example, is divided into magisterial districts, in each of which are elected a supervisor who serves on the county board, three justices of the peace, a constable, and a poor-law officer.

Towns and Villages

In all of the states outside of New England, it is the common practice to separate the more thickly settled districts from the towns and townships and to give them a special legal position and form of government of their own. This is done in a few cases even in New England. These small centres of population are generally known as villages, boroughs, or incorporated towns.

Most of the states have a general law providing the conditions under which the more populous settlements may become independent and self-governing units, and in some instances they are incorporated by special act. There are now in the United States more than 10,000 such incorporated villages, and the

[1] See *Readings*, p. 560.

[2] See Fairlie, *op. cit.*, p. 49.

number is constantly growing on account of the increase of population and also the desire of each community to have as much self-government as possible. The population of such incorporated villages ranges from 100 to 10,000, and they are known by various names, such as villages, boroughs, and incorporated towns. "They are regularly incorporated under general statutes, are given authority in local administration, and serve as agents for the township or county in more general matters. Village administration is regularly in the hands of an elective board or council of from three to nine members elected for from one to nine years. This village council, with its chairman elected by itself, exercises the statutory powers of the village. Frequently, however, a special chairman or president is elected by popular vote as a sort of mayor, in which case he regularly has some supervisory authority and other specified powers, such as justice or police; he also has a limited veto over the acts of the council."[1] The village commonly has general powers over the finances, public buildings, pavements, streets, fire protection, drains, water supply, as well as considerable ordinance power relating to peace and good order.

Centralization of Administration

Local autonomy, or exemption of communities from interference on the part of central authorities, was one of the shibboleths of a certain school of publicists in the nineteenth century. It originated in France and England, where the rising bourgeoisie found the centralized monarchical institutions, principally in the hands of the landed classes, particularly irksome and undemocratic. It was heartily approved in the United States, where economic conditions, especially before the industrial revolution, favored a highly developed localism, and it hardened into a dogma to the effect that interference with local institutions was a species of original sin to be fought on principle and on all occasions. Under the circumstances, undoubtedly, this dogma had its justification, but circumstances have changed since 1850. Affairs that were once of purely local concern have become of state-wide and even national importance. It does not matter much to neighboring counties whether any particular county keeps the

[1] Professor Dealey, *American Year Book*, 1911, p. 228.

weeds cut along the roadside [1] or allows the pound fences to fall into decay, but in these days of swift and constant intercommunication it does matter whether the county safeguards its inhabitants against contagious diseases, assesses its property for state taxation fairly, keeps its highways in order, allows the children to grow up in ignorance, or permits manufactories to pollute the streams.

As a result of increasing state-wide interests, there has come inevitably a demand for more state supervision over local institutions. We now have state boards of health with large powers over local sanitary arrangements, food and dairy products, water supplies, and other matters affecting the health of the state generally. We have state factory and mining inspectors, railway commissions, highway boards, charity and correctional boards and officers, tax supervisors, excise commissioners, and educational officials.[2] Only recently Ohio has sought to standardize the whole system of local finances and to secure efficiency and honesty in local financial administration by instituting a state bureau of inspection.[3] State legislatures are more and more subjecting local authorities to uniform standards in the matter of education, sanitation, highways, and finance. Consequently, through both legislative and executive centralization, local authorities are coming to assume almost purely administrative positions, as the subordinate authorities, carrying out a state-wide will on all matters of fundamental importance. The result has been good — a steady and persistent elevation of the standards of civilization throughout our states.

[1] Even this is scarcely true, for the spread of weeds is not limited to county lines.

[2] See above, p. 501.

[3] See *Readings*, p. 565; below, p. 713.

CHAPTER XXX

STATE AND LOCAL POLITICS

All that has been said above about the position of the political party as the controlling power in the American national government [1] applies with equal force to state, local, and municipal governments. It is through the party that the citizens ordinarily bring their influence to bear upon the operation of these governments and it is likewise through the party that the anti-social forces of our states and cities have been able to carry out their various designs. The ballot at the primary and regular election is the point of contact between the citizen and his government; and the ballot at the primary is in many instances far more important than the ballot at the regular election, for it is at the primaries that the citizens may determine party policies and the selection of party candidates and leaders. It needs no extended argument, therefore, to demonstrate that from the point of view of the citizen seeking to maintain his rights and do his duty, a study of political parties, their structures, and actual operations can take no secondary place in a survey of American government.

It is well to bear in mind at the outset that the state is a unit in the national party organization and forms the basis of that structure. The state regulates the suffrage, nominations, primaries, and elections, — in short, practically all of the operations of parties. It is in the state and city organization that the party has reached its most complete development and has secured the most rigid discipline over the rank and file of the voters. The state organization also merges into the larger national organization through the federal patronage and the functions of United States Senators and members of Congress as party leaders in their respective states. Nevertheless, the overshadowing interest in national politics should no longer be allowed to obscure the fact that the foundations of party government are laid in state and local organization.

[1] Above, p. 166.

State Party Organization and Operations

An examination of party government very readily falls under three heads: party organization, party methods, and legal control of parties. The formal structure of a political party consists of the state and local chairmen, committees, and conventions. At the head of the state organization is the chairman of the state committee who may or may not be a dominant leader in the party. Sometimes, as was the case of Mr. Quay in Pennsylvania and Mr. Platt in New York, the leader is a United States Senator; sometimes, but not very frequently, the office of state chairman is combined with some high office in the state government, as was the case of Mr. Odell of New York, who was the chairman of the Republican committee and at the same time governor of the commonwealth. Again, the chairman of the committee is often merely a figurehead who obeys the orders of leaders, bosses, or powerful private persons who dictate party policies and use him as a screen.

The state chairman in New York is elected by the state committee in both the Republican and Democratic parties. Under the primary law of Wisconsin, the state chairman is selected by the party candidates for certain state offices nominated by the party at the preceding primary elections.[1] In general, we may say that the state chairman is chosen by the state committee or the state convention or, under direct nomination laws, by some group representing the party.

The power of a state committee, in the absence of legislative control, is impossible to define, because party rules usually contain no provision on the subject, and the work of the committee really depends upon the personal strength of its members and their capacity for leadership in the party. In a formal way, the committee holds periodical meetings, makes the preparation for state conventions, and other state party meetings, and takes charge of the preliminaries of such assemblies.

The work of the state central committee is chiefly done by the officers: the chairman, secretary, and treasurer and such members as may see fit to devote their time and attention to party matters. In most state committees there is an executive committee, com-

[1] The standard work on the subject now is P. O. Ray, *Political Parties and Practical Politics.*

posed of a small number of members who manage to gather into their hands, by constant attention to business, substantially all the powers. It is the business of the state committee to supervise the process of obtaining a full party registration and vote; to prevent or heal quarrels and dissensions within the ranks; to see that the local organization is in good working order; to raise funds; and to nominate candidates for state offices in case of vacancies or of minor offices which do not warrant the holding of a state convention.[2] Finally it is the duty of the committee to direct the campaign throughout the state, coöperating on the one hand with the national committee when there is a national election and on the other hand with the local party committees, strengthening the weak places and devoting special attention to the districts in which it is believed the vote will be close.

In the few states which have not adopted state-wide primaries (1920), Rhode Island, Connecticut, Delaware, North Carolina, New Mexico, and Utah, it is the practice for each political party to hold a general convention periodically for the purpose of nominating candidates for state offices and drafting the platform. New York keeps the convention for the purpose of drafting the platform but has the direct primary for nominating candidates.

So far as the management of state party affairs is concerned, the state convention is generally supreme, subject of course to the laws of the state. It is bound by nothing save its own will, the theory being that the delegates coming "direct from the party voters" are the sovereign power within the party for the time being. Accordingly there is often no state constitution for the party, but each convention is regarded as an original and independent body, which may make its own rules of procedure; and for practical purposes it is governed only by the principles of parliamentary law and by precedents.

The Revolt against Party Organization

During the opening years of the twentieth century, the long-established machinery of state party organization — the committee, the conventions, the chairman, and the "bosses" — became the object of savage criticism on the part of citizens. Bryce, in his *American Commonwealth*, had laid out in systematic form

the glaring evils that accompanies "the system," and Ostrogorski in his *Democracy and the Organization of Political Parties* had subjected it to still more voluminous exposition and criticism. The adoption of the Australian ballot in the late eighties and early nineties (see below, p. 675) had failed, as some enthusiastic advocates had promised, to abolish the machine. It had in fact given the party a definite status by recognizing its nominees and officers in preparing the lawful ballots printed by the state for the use of the voters. As a result, party organization was all the stronger.

In almost every section of the country the state party machinery passed into the hands of a few men who dominated the organization. Thus was established the "invisible government" so eloquently pictured by the Hon. Elihu Root in the New York constitutional convention of 1915:

> What is the government of this state? What has it been during the forty years of my acquaintance with it? The government of the constitution? Oh, no, not half the time or half way. When I ask what did the people find wrong in our state government, my mind goes back to those periodic fits of public rage in which the people rouse up and tear down the political leader, first of one party then of the other party. . . . I am talking about the system. From the days of Fenton and Conkling and Arthur and Cornell and Platt, from the days of David B. Hill down to the present time the government of the state has presented two different lines of activity; one, of the constitutional and statutory officers of the state and the other of the party leaders; they call them party bosses. They call the system — I don't coin the phrase — the system they call "invisible government." For I don't know how many years Mr. Conkling was the supreme ruler in this state. The governor did not count, the legislature did not count, comptrollers and secretaries of state and what not did not count. It was what Mr. Conkling said, and in a great outburst of public rage he was pulled down. Then Mr. Platt ruled the state; for nigh upon twenty years he ruled it. It was not the governor; it was not the legislature; it was Mr. Platt. And the capital was not here in [Albany]; it was at 49 Broadway; Mr. Platt and his lieutenants. It makes no difference what name you give, whether you call it Fenton or Conkling or Cornell or Arthur or Platt or by the names of men now living. The ruler of the state during the greater part of the forty years of my acquaintance with the state government has

not been any man authorized by the constitution or by law. . . . The party leader is elected by no one, bound by no oath of office, removable by no one.

The part of the state convention in this "invisible government" was thus described by a man of wide experience in state politics, Mr. Robert Fuller, at the time the secretary to Governor Charles E. Hughes:

The programme of the convention, in practice, is almost always decided upon down to the minutest detail, before the convention meets. The party leader or "boss" and his lieutenants discuss the relative claims of the candidates and decide who shall be nominated. The officers of the convention are agreed upon and their speeches revised. All this is outside the law which ignores the existence of the party leader and assumes that the delegates are free to exercise their own judgment. The real interest in the convention is usually centered in the secret conferences of the leaders which precede it and in which the contests over the nominations are fought out, sometimes with much stubbornness. The "slate" is finally made up by agreement between the leaders who control a majority of the delegates in the convention. The leaders of the minority may either surrender or they may register their protest by presenting the names of other candidates in the convention with certainty of defeat, for it is rare in state conventions that there is so equal a division of strength as to leave the result in doubt. While the leaders are settling what the convention is to do, the delegates are left to their own devices, ignorant of what is going on in the "headquarters" where the leaders are assembled. They are not consulted and their advice is not asked. It often happens that they do not know whom they are to nominate until they hear for the first time in the convention hall the names of the candidates agreed upon by the leaders. Although the law gives them the right to bring forward the names of other candidates, they seldom exercise it and the delegate bold enough to disobey orders is regarded with disapproval.[1]

The remedy offered for the political disease that seemed to inhere in the state party organization and operations was "the direct primary," the choice of party nominees and officers by secret ballot at a special election held within the party, previous to the regular election. As early as 1897, Hon. R. M. La Follette

[1] Fuller, *Government by the People*, pp. 61–63.

in an address before the University of Chicago on "The Menace of the Political Machine," put forward this cure for the evils of the party system; "Beginning the work in the state, put aside the caucus and convention. They have been and will continue to be prostituted to the service of corrupt organization. They answer no purpose further than to give respectable form to political robbery. Abolish the caucus and the convention. Go back to the first principles of democracy; go back to the people. Substitute for both the caucus and the convention a primary election — held under the sanctions of law which prevail at the general elections — where the citizen may cast his vote directly to nominate the candidate of the party with which he affiliates and have it canvassed and returned just as he cast it." Within about fifteen years the legal reform here advocated had been adopted in nearly all of the states in the union (below, p. 691), but it would hardly be correct to say that the ideals of the sponsors have been attained. In fact, Mr. Root's speech quoted above was delivered after the direct primary had been adopted in New York, in support of what he believed to be a more thorough-going reform; namely, a constitutional revision conferring on the governor of the state sweeping powers over all branches of state administration with a view to making him actually responsible for the conduct of the executive business of the state and the preparation of the budget. Judging from recent literature, the problem of "responsible state government" has not yet been solved to the entire satisfaction of the American people.

Local Party Organization and Methods

Leaving out of account the congressional district organization, which, save in rare instances, is of no considerable importance in state politics, the basic unit in the state party machinery is the county organization. It consists of a chairman, a committee, and the convention (unless the direct primary takes its place). The county convention is composed of delegates from lower units — towns, townships, precincts, or election districts as the case may be. The county committee, as a rule, is also made up of representatives from certain local subdivisions, and the chairman is either chosen at the convention or by the committee. The county organization runs even into the great cities: the Cook

county organization in Chicago, the New York and Kings county organizations in New York City, and the Suffolk county organization in Boston are already famous in the history of our local politics.

Perhaps the most famous of them all is the organization of the Democratic party in New York county — the central portion of the great metropolis — popularly known as Tammany Hall but officially known as the Democratic-Republican organization. The governing body in that organization is the county general committee, which is composed of representatives from each assembly district in New York county — the ratio of apportionment being one to every thirteen Democratic voters. This makes an enormous committee, numbering several thousand members. It is theoretically a most democratic institution, for its members come from close contact with small units of party voters; but as a matter of fact its great size makes it an unwieldy body, so far as actual control over party business is concerned. Its size is defended on the practical ground that it enlists among the official workers of the party one voter out of every thirteen, and on the still more practical ground that it brings thousands of dollars a year into the party funds — each member of the county committee being assessed $10 annually.

The real management of the business in this county organization is vested in an executive committee composed of one, two, or three leaders[1] from each of the twenty-three assembly districts. Each leader is chosen theoretically by the members of the general committee for his district, but as a matter of practice any member of the Democratic party in New York county who wants to be an assembly district leader ascertains the number of members to which his district is entitled and then makes up his "slate" — a primary ticket containing his name first, followed by the names of his supporters; and if his ticket wins at the primary, his slate thereupon theoretically proceeds to the formal task of naming him "executive member."

The executive committee and the men intimately associated with it, although often unofficially, virtually control the government of the party and the city of New York whenever the party is in power. They control the finances of the county organiza-

[1] There is also a body of "Women Associate Tammany Leaders."

tion, disburse the funds, agree upon the distribution of city offices, and decide the policies of the board of aldermen and other branches of the city administration.[1] Prominent in the councils of the executive committee are the leaders and officials in the social organization known as Tammany Hall.[2]

The Democratic county organization has its regular officials, president, treasurer, secretary, and other minor officers, but the directing power in the organization is usually in the hands of some astute leader who may or may not occupy an official position in the party, but must "control" a majority of the executive committee.

Within recent years a number of things have conspired to reduce the power of Tammany Hall in New York City politics. The population of the outlying boroughs is outgrowing that of New York county, or Manhattan, so that the geographical area now controlled by Tammany is of diminishing political importance. Civil service reform has materially reduced the spoils of office. In many of the East Side districts the Socialists are encroaching upon Tammany's control over workingmen. The adoption of woman suffrage introduced a new factor. Finally the abolition of the saloon did away with one of the very pillars of the political organization, the place where the "boys" congregated and kept party feeling and activities alive. But the remarkable thing is the adaptability of the organization to changing times. The "braves" even welcomed the women (when they had to) with much suavity.

Ward Politics

The basic unit of the county organization is the precinct, ward, or election district, — the lowest possible subdivision of the state, — the unit in which the polling place is stationed and in which party delegates to the conventions of the larger units are chosen. Here it is that the party workers come into immediate contact with the voters; here it is also that public opinion may be organized to bring pressure to bear upon the party machinery. It is of fundamental importance, therefore, that the party should have in each precinct, ward, or election district, as the case may be, at least one loyal and tried worker, personally acquainted

[1] For Mr. Croker's famous description of the system, see *Readings*, p. 567.

[2] See above, p. 135.

with a large number of the voters and trained in the art and science of winning votes. If this party worker, in the lowest political subdivision, represents the interests and aspirations of the party voters in his district, we have a representative party organization. If, on the other hand, the ward leader is appointed, sustained, and financed by some body "higher up," the whole party organization may be lifted out of popular control and vested in the superior officers who are in charge of the base of supplies. Vote-getting "pays" in the economic sense of the word, for the man who can deliver votes can exact the price from those who are willing to pay for the delivery, and it has therefore come about, in too many instances, that party members, engrossed in the struggle for livelihood, neglect to do their share in party work and the organization falls into the hands of those who make it their business to be always on guard.

In New York City, each county is divided into assembly districts, each of which has a committee, composed of the committeemen serving for the district in the county committee, and also one or more assembly district leaders who are at the same time members of the county executive committee.

The assembly district is in turn divided into election districts, and in each election district there is an election district captain who is almost always actually appointed by the assembly district leader, who is, as noted above, at the same time a member of the county executive committee, which directs the general business of the county organization. Thus a political hierarchy is organized, running down from the state committee through the county executive committee to the election district captain, — an organization which is financed, as a rule, not by innumerable small contributions from the party workers of each district, but by large contributions from men who generally exact a price from those whom the party nominates and places in governmental offices.[1]

[1] Organizations once created and controlling sources of power tend to perpetuate themselves and become institutions. Mr. Herbert Spencer relates an amusing story of a society founded in England for the purpose of securing the enactment of certain legislation by Parliament. It had its president, secretary, treasurer, paid workers, and generous contributors, and after a long season of agitation it succeeded in securing the passage of the bill which it had been advocating. Mr. Spencer, in calling at the headquarters of the society, expected to find general rejoicing, but to his surprise

The prime qualification of the loyal election district captain is subserviency to the leader of the assembly district.[1] The latter is the "executive member" from the district, and at the county meetings, his influence is measured by the vote his district casts and by the union existing among the election district captains of his district. He is the official distributor of the patronage which is allotted to his district, and unless he is supported by a united force of election district captains, the patronage may be withheld to "cause no hard feelings" among the rank and file. Therefore, before a name is placed on the ticket for "president," *i.e.* captain, of the election district, the person bearing that name must swear loyalty to the district leader, and his promise must be obtained to support that leader should there be any fight at the primaries.

In return for this support, the election district captain is designated as inspector at the various elections. To him is intrusted the selection of poll clerks and watchers, and any money that may be sent throughout the election district is distributed by him. This is a most important task of the election district captain, and the proper distribution of the money held by the county officers for campaign purposes is a difficult task. Each election district captain endeavors to have his allowance as much as possible, and desires that he shall receive no less than any other election district captain. The captain is permitted to recommend persons in his district for vacancies in the civil service, and is at liberty to recommend candidates for the minor elective offices. He is a member of the assembly district cabinet, and at local conventions heads delegations from his election district. The chairmanship is his because all delegates to the conventions are selected by him before being placed on the primary ticket. The wise captain does not take it upon himself to name *all* the delegates, but in some convenient "watering place," he calls a meeting of all the voters of his district and allows them to make suggestions as to who should be the delegates.

It is the last-mentioned power that gives the election district captain his place. He is the party official who stands closest to the people, and by wise methods leads the voters in his district to believe that

he found universal sorrow, for the achievement of the purpose for which the society was founded abolished the lucrative offices which it had maintained. The same principle often applies to political organizations.

[1] This description of the work of an election district captain applies generally to a certain party organization in Kings county, New York (Brooklyn), but it is fairly applicable to similar organizations in large cities. The description is furnished by an experienced party worker who has personal knowledge of the matters of which he writes. For additional illustrations, see *Readings*, pp. 579 ff.

they are the working force of the party, and still works in such a manner as to permit them to do nothing that will disturb the peace of mind of his overlord, the assembly district leader. He will call a meeting of the voters of his district and ask them to select delegates to conventions; he will impress upon these delegates the necessity for harmony in the ranks if his election district is to be "recognized" in the distribution of the "loaves and fishes"; he will appeal to their party loyalty, and impress them most strongly with the virtues of his leader by inviting them to partake of "a little refreshment," in his honor, and on the night of the convention will gather the delegates together and march with them to the convention hall, making sure that all bitter feelings are subdued and quenched along the line of the march.

The election captain is looked to by his boss to get out every voter of the party in his district at the regular elections and on registration days. If there is a fight between factions at the primaries, he is charged with delivering to his overlord every possible vote. His power in the assembly district meetings is measured by his ability to deliver the party vote for the candidates of the party, and any split ticket in the district is marked against him. Nothing must interfere with getting every party man to commit himself before a primary fight. How each man will vote at the primary contest must be known to him and reported to the leader of the assembly district before primary day, and every possible means of gaining support must be used. A list of all the newcomers into the district must be made by him, and the names of all party men who leave the district must be sent to the assembly district leader. Every young man who leans towards the party, and is twenty years of age, must be known by him, and all efforts must be made to secure his enrolment with the party on his twenty-first birthday.

The captain knows the business of all party men in his district, and his pockets are almost filled with the business cards of his electors. He exerts all his efforts to find the "vulnerable spots" of the voters and to work on those spots. A young lawyer, for instance, is given a case, which the captain knows of, but on examination it is found that the statute of limitations has barred it years ago. But the young lawyer feels complimented by the leader's apparent interest. He never dreams that anything but interest in him prompted the leader. The captain's time is given almost exclusively to making the acquaintance of the party men in his district. He has a corner office where he stations himself at a certain hour and there holds forth to all his acquaintances, especially the younger men.

All that the captain does, however, has for its purpose the strengthening of the assembly district leader. If he displays the slightest aspi-

ration to assume the district leadership himself, all the force possible is employed against him. He must impress upon every voter the virtues of his master, and all objections to that master's leadership must be answered by a declaration of loyalty. When the assembly district leader has stated his choice of candidates for either appointive or elective offices, the captain must use all his influence to quiet any opposition and must deliver delegates to support the leader's candidates. The captain must bend to the leader's will or throw over the captaincy, or, under the method of election now used, defeat the leader and himself place a ticket in the field in opposition to the leader's ticket at the primaries. This last method is possible, because although a leader may gain sufficient votes throughout the district to elect himself leader, still each election district votes for its own officers and may elect officers who are not in sympathy with the district leader. In one assembly district in Brooklyn, out of twenty election districts, nineteen went for the candidate for assembly district leader in a recent primary, and one against him, and this one elected a bitter opponent of the leader and one who aspires to the assembly leadership. This is a good illustration of the popular power that may be exerted in the Republican party in Kings county and accounts to a great extent for the weakness of the "machine" on many occasions.

To the young man entering the political field, the election district captain is the most accessible party man. He is open to all visitors and does not hesitate to give the young men an opportunity to go as delegates to the various conventions. At the district cabinet meetings he may mention the young man to the district leader and recommend that he would make a good candidate for some minor office. He may also aid in having the young man delegated to the county convention, and, if he is strong enough, may have the district leader name him as a delegate for the state convention. It is at the primaries that the young man can begin his active political work, and there, in nine cases out of every ten, he must begin his work.

The Sources of Party Strength

It is evident that parties cannot exist without organization and that organizations of permanent workers cannot exist without funds, and that the funds must be derived from some place — either from loyal party supporters or from private persons and organizations expecting to derive monetary advantages from the victory of the organization to which they contribute. It becomes necessary, therefore, to examine the sources from which a party organization must expect to derive its sustaining funds.

1. There are, in the first place, the public offices which are to be looked forward to as the legitimate reward of party services. The adoption of the principles of civil service reform has reduced to some extent the relative number of offices to be filled by partisan workers, but nevertheless there remains an enormous number of federal, state, and local offices to be distributed. It is estimated that the political appointments within the gift of the President have an annual value of more than $12,000,000. The multiplication of the functions of state government tends to place an ever larger appointing power in the hands of the governor and the state senate or some other central authority. Every state legislature has within its gift appointments to legislative offices and positions to employ for partisan purposes, usually free from civil service control. For example, there are sergeants-at-arms and assistant sergeants-at-arms, principal doorkeepers, first and second assistant doorkeepers, journal clerks, executive-clerks, index clerks, revision clerks, librarians, messengers, postmasters, janitors, stenographers, and messengers to the various committees and assistants first and second, too numerous to mention — the legislature of New York costs the state for its mere running expenses alone more than $800,000 a year. Then there are the city offices, high and low, steadily multiplying in number and, in spite of the civil service restrictions, to a large extent within the gift of the political party that wins at the polls. Finally there are the election officers, a vast army of inspectors, ballot clerks, and poll clerks for the primary and regular elections, who derive anywhere from $10 to $50 a year for their services. New York City spends annually more than $400,000 in paying the officials who preside at primaries and elections.

2. In the next place there are the levies on the candidates. Generally speaking, no one can hope to be elected to office to-day without being nominated by one of the political parties. The party organization wages the campaign which carries the candidate into office, and what is more natural and just than the demand that the candidate shall help to pay the legitimate expenses of the campaign? It is a regular practice, therefore, for party organizations, state and local, to levy tribute from candidates for nominations as well as from nominees to office — generally in proportion to the value of the office they seek. Mr. Wheeler Peckham testified before the Mazet Commission in 1899 as fol-

lows: "It is generally assumed that a candidate for a judicial position [in New York City] pays somewhere or other, either for nomination or election, or assessment in some way, quite a large sum. Judges have spoken to me about assessment and deprecated the existence of it very strongly. I suppose the amount paid would range between $10,000 and $25,000.[1] . . . I assume that referees are to a great degree appointed with reference to the judge's recognition of the political party or political organization that nominated or elected him, and to which he owed his nomination. Judges of the courts here recognize their obligation to the political organization which elected them, and they have a desire, and it is carried to a greater or less extent in the distribution of the patronage that belongs to them, to recognize that fact."[2] There are in addition levies on office-holders, after election, even in spite of the laws forbidding this practice. Office holders do not always wait to be pressed by the party in this matter. It is not expedient to wait.

3. The construction of parks, school buildings, highways, and other public works is a fruitful source of revenue to the party organization which controls the letting of contracts. High bids may be accepted on the condition that the surplus shall go to the party war chest or to party leaders. The capitol building and grounds at Albany cost the state nearly $25,000,000, and the plunder of the public treasury in the construction of the capitol at Harrisburg is a matter of recent history.

4. Undoubtedly the most fruitful source of revenue for party organizations within recent years has been contributions from corporations (now frequently forbidden by law). Railway, insurance, banking, gas, electric, street railway, telegraph, express, telephone, and other public service corporations must receive many privileges from cities and states. They must secure franchises in the first place, and some must have permits to tear up streets and highways, and extend their operations in various forms. To secure special favors, for which they ought to pay large sums to the public, corporations too often find it cheaper and easier to contribute handsomely to party organizations and to have the organization "control" the proper officials. Very

[1] The salary of some judges is $17,500 a year and the term fourteen years.

[2] *Report of the Special Committee of the Assembly Appointed to Investigate the Public Offices and Departments of the City of New York*, Vol. I, pp. 358–360.

often, also, party leaders compel corporations to pay heavily for securing permits to which they are legitimately entitled, and in such instances corporations usually find it easier to pay than to go to law or argue.

Mr. H. H. Vreeland, prominent in financial circles in New York City, testified during a grand jury investigation in 1908 that he had contributed five years before on behalf of a certain corporation $20,000 to Mr. Odell, chairman of the Republican state committee and $16,500 to Mr. Murphy, leader of the Tammany Democracy in New York City.[1] The way in which the Metropolitan Street Railway Company had to deal with New York politicians he further described in the following testimony:

QUESTION: In these corporate ventures that you have been connected with of a large character, have you found that the favors to politicians, contributions to political parties, election expenses, have been of value or were commonly esteemed to be of value to the corporation? ANSWER: I have found that they were esteemed to be of value.

QUESTION: Is it necessary for the Metropolitan Street Railway to open the streets of New York a great deal? ANSWER: Yes, Sir.

QUESTION: Whenever they want to open a street they have to get the permit countersigned by the Borough President and the Commissioner of Gas, Electricity, and Water Supply? ANSWER: Yes, Sir.

QUESTION: Each of them has got to sign a permit before it is opened? ANSWER: Yes, Sir, and whenever the property is adjacent to a park it has to be signed by the park official.

QUESTION: An antagonistic water, gas, or electricity official could impede somewhat the work of the railroad company in the city here? ANSWER: Very materially.

QUESTION: Did you ever have any experience with being impeded in that way? ANSWER: Yes, Sir; I have a number of instances.

QUESTION: And afterwards were those impediments withdrawn? ANSWER: They were.

QUESTION: Withdrawn without legal process? ANSWER: Yes, Sir.

QUESTION: Was the method of securing those withdrawals such that led you to believe that it had been by cultivating in some way the favor of these officials? ANSWER: There was no action of any kind that would give me any impression on it, because a permit would be in the [proper city] office and under the best endeavor we could not get it, and all of a sudden it was signed and sent up to our office.

QUESTION: You have no doubt in your own mind as to why the

[1] New York Times, April 23, 1908.

permit was given — somebody was "seen," and therefore the permit was given? ANSWER: I would have a very strong idea that something had been done.

5. The most despicable source of party revenue is that derived from the protection of gambling and vice in every form. The extent to which this opportunity is exploited is, of course, difficult to determine; but indisputable evidence from cities as far apart as San Francisco and New York illustrates only too painfully the way in which party war chests are sometimes augmented by stained money drawn from criminal elements to which police immunity is afforded.[1]

Although the exact amount of money collected by various political organizations from time to time is difficult to ascertain, the total levied in any year of a general election undoubtedly reaches a fabulous sum, and this money is applied largely to the conduct of campaigns, although some portions of it frequently find their way into the private exchequers of party leaders. It is spent for printing, advertising, hiring halls, securing speakers, and paying the rank and file of party workers. Undoubtedly large sums find their way through some of the election district captains to venal voters. The extent of the purchasable vote is, of course, impossible to state; but a careful study of Rhode Island made some years ago placed it between ten and twenty-five per cent of the total number.[2] Every worker in practical politics, although he may not acknowledge it, probably knows that votes are bought, sometimes grossly by outright purchase at a fixed price, and at other times in more subtle ways, as for example, by paying railway fares and expenses for electors going home to vote, paying countrymen to come out to vote, and employing party workers with the tacit understanding that they have little or nothing to do.

It is by no means through money alone that the party organization may maintain its strength. The party, like a church or any other organization, may be used as a social club through which the young man may make valuable acquaintances who can help him in securing business, clients, or patients as the case may be. The very power of the party organization thus enables it

[1] For the testimony of Police Captain Schmittberger before the Lexow Investigating Committee in New York, see *Readings*, pp. 505–508.

[2] See article on "Venal Voting," in the Forum for October, 1892.

to intrench itself by drawing within its rank the best energies and talents of young men who, though by no means void of patriotic motives, cannot be oblivious to the stern necessities of the struggle for existence. In some cities, it is well for the young lawyer practising in certain courts to be known as a prominent worker in the party to which the presiding judges belong. A Democratic doctor in a strongly Republican district of some northern city would doubtless find his rise in the world somewhat handicapped if he were overzealous in the support of his party, and a belligerent Republican lawyer in a southern city might very well find his business limited to practice in the federal courts. The subtle influences of party control are doubtless more powerful than the gross influences which appear upon the surface.

The last, but by no means the least, powerful element in organized politics is the management of the voters. Party leaders and workers assist the poor voters by a thousand charitable acts. They give outings, picnics, clam-bakes, and celebrations for them; they help the unemployed to get work with private corporations or in governmental departments; they pay the rent of sick and unfortunate men about to be dispossessed; they appear in court for those in trouble, and often a word to the magistrate saves the voter from the workhouse or even worse; they remember the children at Christmas; and, in short, they are the ever watchful charity agents for their respective neighborhoods. A kind word and a little money in time of pressing need often will go further than an eloquent tract on civic virtue.[1] Thus politics as it works through party organization is a serious and desperately determined business activity; it works night and day; it is patient; it gets what it can; it never relents.

Election Laws

The frequent abuses connected with party organizations and operations, as we have seen,[2] have led to elaborate laws controlling the entire election process from the enrolment of the voters to the final review of the official count. It is impossible to set down here in any detail the provisions of the election law of a single state, — the election law of New York is a volume of

[1] See *Readings*, pp. 579 ff.

[2] Above, p. 139.

about 250 pages of ordinary print, — but the following principles are now to be found in the legislation of any fairly advanced commonwealth: —

1. Certain officers — the secretary of state, county clerks, and in some instances special authorities — are placed in charge of the entire election process.

2. Provisions are made for bi-partisan boards of poll clerks, ballot clerks, and election inspectors in each polling place within the state.

3. Duly authorized watchers from each party may be present at each polling place in order to secure a fair count.

4. Standard and official tally sheets, or records, on which to make the returns of each polling place, are furnished, and all returns must be certified by the proper officers in charge.

5. Special arrangements are made to police polling places, and saloons are usually closed on election days.

6. In order to secure to every citizen, properly qualified, the right to vote, official registers of voters are prepared before each election, and each citizen is entitled to enter his name so that on election day his right may be realized. A most drastic scheme for preventing false registration was created in New York, in 1908, by a law requiring the personal identification of voters in cities of 1,000,000 or more inhabitants.[1] According to this law the voter, on registering, in addition to answering the ordinary questions, must give the number of the floor or room in which he lives and the name of the householder or tenant with whom he lives; he is furthermore required to sign his name if he can write, and when on election day he appears to vote he must again sign his name opposite the first signature. In case the voter is unable to write, he must answer a long list of questions with regard to his private affairs, residence, and employment; and when he appears on election day he is required to answer the same questions. By a comparison of the signatures or the answers to the questions, the election officials are able to detect frauds and thus prevent from voting a large number of "floaters" and "repeaters." There is no doubt but what the effect of the law has been most salutary.

7. Finally, we have a long line of important legislation on the ballot — designed to prevent intimidation by securing secrecy

[1] California already had a similar law.

to the voter, and to encourage independent and discriminating choice from among the various candidates in place of the blind acceptance of party nominations. Legislation of this character is now so prominently before the public and the principles involved are so important that it seems desirable to go into the matter at some length,[1] elaborating the general statements made above.[2]

Prior to 1888 the printing of ballots for use in the election of public officers, and their distribution to the voters, was left to private initiative — subject generally to a few statutory regulations as to their size, color, form, etc., chiefly designed to produce uniformity and to prevent the use of misleading or deceitful forms of ballot. In actual practice the ballots were printed and distributed by the several party organizations, prepared by the voters — in case any "scratching" of party candidates was to be done — before going to the polls, and, when taken to the polling place on election day, merely deposited in the ballot-box in plain view of all present.

In most of the states the statutory provisions dealing in any way with the preparation or use of ballots were comparatively brief and simple. The Kansas law of 1868 is a fair example.[3] Its provisions are as follows: —

"§ 7. *Manner of voting.* Each elector shall, in full view, deliver to one of the judges of election a single ballot or piece of paper, on which shall be written or printed the names of the persons voted for, with a proper designation of the office which he or they may be intended to fill.

"§ 8. *Duty of Judge; ballots how disposed of.* The judge to whom any ticket may be delivered shall, upon the receipt thereof, pronounce, in an audible voice, the name of the elector, and, if no objection shall be made to him, and the judge is satisfied that the elector is legally entitled, according to the constitution and laws of this state, to vote at the election, he shall immediately put the ticket in the box without inspecting the names written or printed thereon, and the clerks of the

[1] Note. — For the entire statement given here with regard to recent ballot legislation I am indebted to Mr. Arthur Crosby Ludington, who has generously prepared the manuscript for me after long and critical examination of the whole subject. For a fuller account, see his article in the South Atlantic Quarterly for January, 1910, and his chapter in the *New York Library Bulletin of Legislation* for 1910.

[2] See above, p. 141.

[3] Gen. Stat., 1868, ch. 36, Art. 2.

election shall enter the name of the elector and number in the poll-books . . . "

There was usually some provision for checking off the names of voters on the registry list or poll lists as they voted, so that the total number of ballots cast could be accurately determined and ballot-box stuffing prevented. There were also penal provisions to guard against violence, intimidation, ballot-box stuffing, "repeating," voting without being qualified to vote, bribery, false swearing when challenged, non-performance or mal-performance of duty by election officers, etc., — in short, the grosser varieties of election offences.

This system of so-called "vest-pocket" ballots was found, as party rivalry became more intense, to be deficient in many respects, and open to the most serious abuses. Chief among its defects was its utter failure to provide for secrecy in voting. Since the voter could be watched from the moment a ballot was handed to him somewhere outside the polling place until he deposited the same in the ballot-box, it could easily be ascertained whether he had, according to the modern phrase, "delivered the goods." The result of this was to facilitate and encourage bribery. Another result was that persons economically dependent, being deprived of the protection of secrecy, were coerced into voting as others bade them, or punished if they disobeyed. The expense of printing the ballots, moreover, while not a heavy burden on the party organizations, was large enough to act as a deterrent on independent candidacies; and such tricks as the distribution to voters of one party of ballots bearing the name or emblem of that party but the candidates of another, or of ballots containing the wrong candidates for certain offices, while usually forbidden under the penal law, were nevertheless common.

The prevalence of these abuses, especially in the presidential campaign of 1884, aroused a strong movement for reform[1] and finally led to the adoption by most of the states of the so-called "Australian ballot system." The principal features of this system may be outlined as follows:

1. All ballots used in elections of public officers (except, usually, certain minor local elections) are printed under the direction of

[1] Described in an article by W. H. Glasson on "The Australian Voting System," South Atlantic Quarterly, April, 1909. Above, p. 141.

public officials, at public expense, and are distributed by these officials to the various polling places prior to the election.

2. Each ballot contains on a single sheet the names of all the candidates duly nominated by any political party or independent group, whose names have been certified to certain designated public officers a specified number of days before the election, and is protected against counterfeit by an official indorsement on the back.

3. Ballots are obtainable by the voters only within the polling places, on election day, from the regular election officials, and are to be marked in absolute secrecy in voting booths provided for the purpose, folded so as to conceal the marking on the face and yet leave exposed the official endorsement on the back, and returned to the election officers to be deposited in the ballot-box, before the voter leaves the polling place.

4. Special safeguards — in addition to those contained in the earlier American laws — are usually provided to insure that the official ballots shall not be lost or stolen, or their contents divulged prior to election day (except as the publication or distribution of sample ballots is permitted); that none but official ballots shall be cast or counted; that the number of ballots counted shall correspond exactly with the number of persons voting, and that the ballot actually cast by each voter shall be the identical one given to him by the election officers (these last two objects are usually sought to be attained by a system of detachable, numbered stubs); that no official ballot shall be left unaccounted for when the election is over; that no electioneering shall be done in or around the polling place; that only the election officers, the duly appointed watchers of each party, and a specified number of voters shall be allowed within the polling place at any given time; that no voter shall place any mark upon his ballot tending to identify it as having been cast by him, or shall divulge, while in or near the polling place, how he has voted; and that no election officer or other person shall attempt to discover, or having discovered shall in any way disclose, how any voter has voted.

The first law adopted in the United States embodying the essential features of this system was enacted by the legislature of Kentucky and approved by the governor on February 24, 1888, and went into effect at once.[1] It applied only to munici-

[1] *Laws*, 1877–78, ch. 266.

pal elections in the city of Louisville. In this act the English and Australian models were quite closely followed. All candidates were to be nominated by petition, and their names were to be printed on the ballot in alphabetical order under the title of each office to be voted for, and without party designations of any sort.

This act, on account of its failure to recognize in any way the peculiar party system which had grown up in this country, was afterwards followed as a model by but few other states.

A statute which has been far more generally copied, and which has often received the credit of being the first Australian ballot law adopted in the United States, is the Massachusetts act of 1888.[1] In this act the original Australian system was modified by the recognition, in several respects, of the party organizations. A political party was defined for the purposes of the election law, the criterion being the casting of a certain percentage of the total vote at the preceding state election.[2] Any group of voters conforming to this definition was allowed to nominate, by caucus or convention of delegates, one candidate for each office to be filled at any election, and to secure the placing of his name on the official ballot by means of a "certificate of nomination," signed by the presiding officer and secretary of the caucus or convention, and filed with the secretary of the commonwealth, or the officer charged with the duty of having the ballots printed, a certain number of days before the date of the election. The name of each candidate so nominated was to be followed on the ballot by the designation of the party which had nominated him. For the sake of independent voters, and of newly formed political groups, it was provided that candidates might also be nominated by means of "nomination papers," signed by a prescribed number of qualified voters, and that any voter might write on his ballot, in blank spaces provided therefor, the names of any other persons whom he wished to vote for as candidates for any office.[3] The names of all the candidates, however nominated, were to be arranged in alphabetical order under the title of each office.

[1] Acts 1888, ch. 436; approved May 29, 1888; went into effect November 1, 1889.

[2] Other criteria have since been adopted in different states.

[3] This latter provision was merely continued from the earlier American laws, having generally been held by the courts to be a right constitutionally guaranteed to the voter.

A third statute, which has since been even more widely copied than that of Massachusetts, was the Indiana law of 1889.[1] This act represented a still further compromise with the American party system. It provided for a form of ballot — which has since come to be known as the "party column" form — on which all the candidates of each party were grouped in a separate column, the columns being placed side by side with the names of all the candidates for any one office on the same horizontal line. At the head of each column was placed the name of the party and some simple device or emblem selected by the party to designate its candidates; also a circle, usually known as the "party circle," by a single cross-mark in which the voter could vote for all the candidates in the "party column" below. This special method of voting a "straight ticket" has usually accompanied the "party column" form of ballot, and, as was demonstrated by the late Philip Loring Allen,[2] has had a most important effect in discouraging independent voting and preserving intact the two great party organizations.

In this same year — 1889 — six other states adopted Australian ballot laws, and Connecticut also passed a halfway measure providing for separate, unofficial ballots for each party, printed (as under the Louisiana law of 1877) on paper officially furnished, and to be inclosed (somewhat as under the Utah law of 1878) in official envelopes obtainable only at the polling places. From then on the progress of ballot reform was rapid.[3]

[1] Laws, 1889, p. 157; App. March 6.

[2] Mr. Allen, in a thoughtful and convincing article on "Ballot Laws and Their Workings," in the Political Science Quarterly for March, 1906, came to the conclusion that where the marking of each individual candidate on the ballot is compulsory the voters exercise from twice to ten times the discrimination among the candidates shown under the other ballot systems which favor straight voting. At the bottom of the scale in proportion of independent voting are the states requiring the voter to write or paste in names whenever he wishes to "scratch his ticket."

[3] In 1890 five states and one territory adopted Australian ballot laws, Kentucky passed laws similar to the Louisville act of 1888 for four other cities, and New Jersey and New York enacted compromise measures, somewhat more advanced than the Connecticut act of 1889, providing for a separate official ballot for each party (and, in the case of New Jersey, for official envelopes).

In 1891 seventeen more states and another territory were added to the ranks.

At the close of 1896, only eight years after the first law was adopted in this country, there were thirty-eight states and two territories with state-wide Australian ballot laws, two more (Tennessee and Texas) with Australian ballot laws applying to cities or counties above a certain size, and two others (Connecticut and New Jersey) with halfway laws embodying certain features of the Australian system. In the whole United States only Georgia, the two Carolinas, and New Mexico had as yet failed to adopt the reform to some extent.[1]

In 1909, forty states and one territory had state-wide Australian ballot laws, two states (Tennessee and North Carolina) had similar laws which were not state-wide, two states and one territory (Missouri, New Jersey, and New Mexico) had halfway measures embodying certain features of the Australian system, and only Georgia and South Carolina remained totally unregenerate.

The more important forms of ballot which have been used in this country since the adoption of the Australian system (not counting the curious compromise forms used in a few exceptional cases) may be divided into four principal classes. These are: *First*, the straight "Massachusetts" ballot, in which the names of the candidates of all parties (either with or without party designations) are grouped in order (usually in alphabetical order) under the title of each office, and in which there is only one method of marking the ballot — *i.e.* by means of a cross opposite the name of each candidate to be voted for. The model for this class is, of course, the Massachusetts act of May 29, 1888. *Second*, the "party column" form of ballot,

In 1892 two more Australian ballot laws were enacted, and Kentucky for the first time passed a state-wide law.

Two more states were added in 1893, one in 1894, one in 1895 — in which year New York abandoned the compromise system of 1890 in favor of the full Australian system as adopted by most of the other states — and, finally, two in 1896.

[1] In 1897 Missouri abandoned the regular Australian ballot system (the only case in which this has happened) and adopted a system of separate official ballots for each party somewhat like that of New Jersey. In 1903 Texas adopted a similar system for the whole state. In 1905, however, this law was repealed and a state-wide, Australian ballot law adopted. In the same year New Mexico adopted the "separate official ballot" system. In 1909 Connecticut joined the ranks of the straight Australian ballot states, and North Carolina passed its first Australian ballot law to apply to one county.

with special provision for voting a "straight ticket" by a single cross in the "party circle," or by some other method simpler than that by which a "split ticket" may be voted. The original model for this form of ballot is found, as above indicated, in the Indiana law of March 6, 1889. *Third*, the modified "Massachusetts" form, in which the grouping of the candidates' names under the titles of the several offices is preserved, but a special provision for voting a straight party ticket is added. The first states to adopt this form of ballot were Montana and Minnesota, on March 13 and April 24, respectively, 1889. *Fourth*, the modified "Indiana" form, in which the "party column" arrangement is retained, but with no special provision for voting a straight party ticket — the only method of marking the ballot being a cross opposite the name of each candidate to be voted for, just as in form number one. The earliest example of this form of ballot is the Missouri act of May 16, 1889, applying only to cities of over 5000 inhabitants.

Whatever the form of Australian ballot, the main purposes of the original sponsors of the idea have been realized. The ballot is official; it is secret; it is printed at public expense; it is free; and it is surrounded by many safeguards. It cannot be said however that the Australian ballot, in spite of the great improvements which it brought about in the conduct of elections, did prove to be "a panacea for the evils which afflicted American life." Its early advocates said, "It would put an end not only to bribery and intimidation of the electors and to frauds in the taking of the vote, but it would undermine the very foundations of the Machine: it would deprive it of a pretext for interfering with elections, for employing 'workers,' for levying assessments, and would strip its candidates of their privileged character; the assent of the machine would no longer be required for getting on the printed list; the state which would henceforth make up this ballot would enter every candidate, whether recommended by a party organization or not, would submit them all without distinction to the electors; a poor man would therefore have the same facilities as a rich man, and an independent the same chances as a party hack, of entering public life." As is frequently the case, the ideals of the reformers were not all carried out in practice, but their work was well worth doing. No one can doubt that the tone of American elections, notwithstanding the room

left for improvement, has been decidedly raised by the introduction of the Australian ballot.

Non-Partisan Nominations and Elections

The persistent injection of state and national issues into municipal elections led to two important reforms which are now quite wide spread. The first of them is the separation of municipal elections from other elections by holding them on a special date or during the "off years" when there are no state or national candidates in the field. By concentrating attention upon the local questions a large amount of independent voting is undoubtedly induced. The idea is simple and readily carried into execution.

The second reform is aimed in the same direction, namely, the elimination of extraneous issues from local political contests by the introduction of non-partisan primaries and elections. This device, now carried into effect in cities as widely separated as Boston, Des Moines, and San Francisco, attempts to exclude the party organization as such from all participation in the nomination and election of candidates. One form is found in the Des Moines plan of commission government: any person may get his name on the primary ballot by securing a small number of signers to his petition; no party designation or symbols are allowed; the ten candidates polling the highest votes in the primary appear on the ballot in the regular election, still without any party signs or symbols. In Boston any one can become a candidate for mayor or councilman by securing 5000 signatures to his petition which bears no party symbol. The practice is now quite common, especially in commission governed cities. To say however that it has eliminated local party organizations from municipal politics does not quite square with the election results, but there it is clearly evident that the system, while it does not guarantee independence in politics, does make it easier for the independent candidate to get a hearing.

As the non-partisan idea spread among cities, it was taken up in connection with the election of judges. It was adopted for this purpose in three states in 1911, California, Ohio, and Washington; in Minnesota in 1912; and in Idaho, Iowa, Kansas, Nebraska, Pennsylvania, and Missouri, the following year. The methods vary from state to state. The Kansas law of 1913

authorizes designation by petition; the names of the persons so designated by petition are placed without party signs or names upon a separate ballot at the official primaries; the two candidates for each judgeship receiving the highest votes appear without party signs upon the official ballot at the regular election. California attempted to carry the non-partisan principle into the election of all state officials, but the law was rejected on a referendum to the people in 1915. Minnesota in 1912 adopted the non-partisan primary for the selection of judicial, county, and certain municipal officers as well as members of the legislature. It is recorded that "this is the first instance of the abolition of the party label in the nomination and election of members of a state legislature."

There are evident limits to the application of the non-partisan principle. Party organizations are too well grounded in American political life to be uprooted by the mere abolition of symbols. In municipal and judicial elections, where partisanship is ordinarily not so strongly manifest, the exclusion of party designations and signs frequently works for independent voting and makes somewhat more difficult the operations of the party "boss." The larger the city, the more difficult it is to divorce elections from partisan methods.

Absent-voting Legislation

The whole trend of modern election legislation is in the direction of protecting the voter in the exercise of his rights and making it easy for him to cast his ballot in comfort and safety. In the old days, elections in rural sections were held at the county seat and all voters who expected to take part had to journey thence and remain till the close of the polls, perhaps two or three days if the contest was a hot one. Now we bring the polls near to the voter. In the city he has only to walk a block or two to find his ballot box.

That is not all. Modern industrial and commercial life makes it necessary for men to be away from home frequently, in distant cities or states, and thus deprives them of the franchise in effect, as long as physical presence at the polling place on election day is necessary to the exercise of the suffrage. To meet this condition of affairs, at least half of the states have enacted laws

which permit electors to vote at primaries or elections or both without appearing at the polls. Legislation of this type seems to have begun with the Vermont law of 1896. Twenty-four years later twenty-four states had adopted the idea in one form or another.[1] Special attention was called to the subject during the war against Germany when millions of men were with the flag or in civilian service. Indeed some of the laws apply expressly to soldiers and sailors. The majority of them, however, are not limited in their scope but apply to civilians as well as to those in military service.

The absent-voting laws, as may be imagined, differ widely in form and content, but certain principles run through them all. They cover the following elements: (1) distance from home necessary to entitle the voter to the privilege; (2) causes of absence, such as sickness, nature of his business, some unavoidable cause, or in a few cases no cause at all; (3) whether the absent voter shall be entitled to vote in primaries, elections, or both, and on questions before the electorate on referendum; (4) the application for the ballot and the declaration necessary to obtain it; (5) the marking of the ballot and the affidavit required to authenticate it; (6) the transmission of the ballot to the election official in the home precinct of the voter; (7) and the rules governing the acceptance, rejection, and counting of such ballots. In the more carefully drawn laws, such as those of Indiana, Illinois, and Minnesota, all of these points are covered with such precision that collusion and fraud are almost impossible. The right of the absent voter is fully safeguarded, while the possibility of misuse of the privilege of absent voting is reduced to the minimum. Among the states that have legislation in some form are Illinois, Iowa, Massachusetts, Michigan, Montana, Ohio, Texas, Wisconsin, Nebraska, Oklahoma, Oregon, and Washington.

By way of summary, it would appear that American legislation covers almost everything necessary to enable the voter to exercise his rights:

1. The polling place is brought near to his residence.

2. Notices of the time and place of the election are printed, posted, and published.

[1] P. O. Ray, American Political Science Review, p. 251, May, 1918, for a complete and detailed summary of legislation up to that date.

3. Official specimen ballots are furnished for his instruction before entering the polls.

4. Spaces are left on the ballot so that the voter may write in the names of any candidates that do not appear on the official ballot.

5. The ballot is marked in secret.

6. Provisions are made for bi-partisan election boards and for watchers and challengers of all parties.

7. Official tally sheets and poll books are kept and the ballots are numbered so that the possibility of "counting out" candidates is reduced to a minimum.

8. In case of a contested election a judicial review of the ballots may be had before a regular court of law.

9. The voter may exercise his right even though away from his residence at the time of the election.

Preferential Voting and Proportional Representation

The limitation of the voter's right to expressing an opinion in the form of only one vote for a single candidate from his district or a block of five or more elected at large will be found on examination to be a severe limitation. Under our plurality system of elections it often happens that a candidate receiving less than half of the total vote of the district is elected and that large minority groups are altogether unrepresented.

To meet some of the objections lodged against the old system of elections a plan of "preferential voting" was introduced in Grand Junction, Colorado, in 1909, and afterward spread in one form or another to Spokane, Washington; Cleveland, Ohio; Duluth, Minnesota; and a score or more of towns and cities. Under the Grand Junction scheme the names of candidates are arranged in one column on the ballot and after the names are three blank columns, headed "first choice," "second choice," and "other choices." The voter may thus indicate his first and second choices for the office in question, and if he has sufficient regard for any other candidates he may indicate any or all of them as acceptable by marking their names among the "other choices." If any candidate receives a majority of first choices, he is declared elected; if not, then the first and second choices of the candidates are added, the candidate with the highest number of votes winning if he has a majority. If this second step does not pro-

duce a majority, then all the choices of each candidate are added together and the man standing highest wins whether he has a majority or not.[1]

Proportional representation is designed to make the legislature "an exact picture of the electorate" by giving to each party or group a number of legislators proportioned as nearly as possible to the number of votes cast by it. This system is in use now in Ashtabula, Ohio (1915); Boulder, Colorado (1917); and Kalamazoo, Michigan (1918). According to it all members of the city commission or council are elected at large on a single ballot. The candidates are nominated by petition. The voter, on election day, indicates by arabic numbers, "1," "2," "3," etc., his first, second, third choices, and so forth. A "quota" is then ascertained by dividing the total number of valid ballots cast by the number of members to be elected, plus one. This quota is the number of votes which any candidate must receive to be elected. As many candidates as have a quota of first-choice ballots are at once declared elected. The surplus votes not needed by the candidates elected are then distributed to the other candidates according to the choices indicated on the ballots until at length the total number of vacancies to be filled (commissioners or councillors to be elected) are filled by candidates having the required quotas. The process, though apparently complicated, is easy to operate when understood. In practice, proportional representation seems to give to all the important groups of the city representation according to their strength.[2]

Primary Election Laws[3]

State legislation now goes behind the regular official elections and controls to a greater or less extent the structure and operations of the several parties.[4]

I. At the outset, the legislature must determine the character of the political associations which are to be brought within the purview of the law, for groups with slight numerical strength or formed for only quasi-political purposes are obviously outside

[1] National Municipal Review, January, 1914, p. 83.

[2] See A. R. Hatton, in the National Municipal Review, January, 1916, p. 56.

[3] See Merriam, *Primary Elections*.

[4] See above, p. 142.

the scope of primary legislation. In meeting this problem of definition, two rules have been devised. It is sometimes the practice to extend the application of the law only to those political associations which cast a *fixed* number of votes for some specified candidates at the preceding state election. New York, for example, places the minimum at ten thousand votes for governor, and specially exempts from the operation of the law organizations and associations of citizens for the election of city officers, providing that membership in such an association shall not prevent the elector from enrolling with and acting as a member of a political party. The more frequent practice, adopted by the most recent statutes, is to determine upon some percentage of the entire vote which any political organization must cast in order to bring it within the view of the law. The Iowa statute of 1907 includes in the term "political party" any organization which at the last preceding general election cast for its candidate for governor at least two per cent of the total vote cast at that election. Oregon defines a political party as an affiliation of electors representing a political organization which at the preceding general election polled for its candidate for Congress at least twenty-five per cent of the entire vote cast for that office in the State. (Law of 1905.)

II. After the definition of what organizations shall come within the purview of the law, it is next imperative that some precise and regular mode should be provided for determining who are entitled to membership and voting rights within the party. Otherwise it would be impossible for the primary law to attain its fundamental purpose of securing the expression of the popular will on the composition of the committees and conventions, the nomination of candidates, and the drafting of the platform. This principle is enunciated in the preamble to the Oregon law: "Every political party and every volunteer political organization has the same right to be protected from the interference of persons who are not identified with it as its known and publicly avowed members that the government of the state has to protect itself from the interference of persons who are not known and registered as its electors. It is as great a wrong to the people, as well as to the members of a political party, for any one who is not known to be one of its members to vote or take any part at any election or other proceedings of such political party, as it is

for one who is not a qualified and registered elector to vote at any state election or to take part in the business of the state." This seems axiomatic; but obviously it is difficult to prescribe the conditions of party allegiance without at once preventing that independence in voting which is the hope of decent politics. If only known party voters are to attend the primaries, what becomes of the secret ballot at elections — that boon which it took so many years to secure? In the midst of a great diversity of practices in this matter of providing a party allegiance test, four general methods are discernible: official enrolment in the party by secret or open process; personal declaration at the primary; investment of the right to determine the test in party officials; and the heroic device of abandoning the test altogether by the establishment of secret primaries.[1]

1. The first of these methods has been adopted in New York. In the cities and villages where the personal enrolment law applies, the voter, on registering for the coming election, receives a blank which he must fill out if he intends to participate in the primary elections of any party. He then goes into a booth where he indicates by a mark under the emblem the party with which he intends to affiliate, and at the same time subscribes to a declaration running as follows: "I am in general sympathy with the principles of the party which I have designated by my mark hereunder; it is my intention to support generally at the next general election, state or national, the nominees of such party for state and national offices; and I have not enrolled with or participated in any primary election or convention of any other party since the first day of last year." The enrolment blanks so filled out are placed in sealed envelopes and deposited in a special box; a week after the regular election the seals are broken and the lists of each party made up from the declarations. Judicial process may be invoked for the cancellation of the names of fraudulent voters and the names of voters who have died or moved out of the district before the ensuing primary. The chief objection to this system is that urged against viva voce voting at elections; namely, that it makes

[1] On this problem, see a valuable article by Professor Charles E. Merriam in the Proceedings of the American Political Science Association, 1907, pp. 179 ff.

public the party affiliation of every voter who enrolls, and makes him liable to the pressures incident to such publicity.[1]

2. The second test of party allegiance, that is, personal declaration at the primary, is one quite generally applied, but it tends to approximate the New York plan owing to the frequent adoption of an official register based on such declarations. According to this scheme, the voter at the primary asks for and receives the ballot of the party in whose nominations he wishes to take part, and, unless challenged, he deposits the ballot in the box of the party he has chosen; if challenged he takes an oath to the effect that he is a member of that party, has supported it generally at the last election, and intends to vote for at least a majority of the candidates at the coming election.

3. The third method — leaving the imposition of the test to the party officials operating under organization rules — is prevalent in the South where, for well-known reasons, the dominant party has desired a generous freedom in this respect.

4. Wisconsin has solved the problem of the allegiance test by a heroic provision: each voter at the primary is given ballots of all the parties; the ballots are officially prepared and all alike in form and color and are in a single sheet separated by perforated lines; on each ballot the names of the several party candidates are arranged in alphabetical order[2] under the titles of the offices to which they seek the nomination; the voter separates from the group of ballots the ballot of the party for which he wishes to vote, marks it, folds it, and then deposits it in the regular box. All the other papers he puts in a separate box for the blanks, which are destroyed immediately after the canvass. Thus absolute secrecy is preserved.[3]

[1] Another disadvantage of the scheme of enrolment and in fact of all tests for party membership is the difficulty it places in the way of separating state and national from local issues.

[2] Provision was made in 1909 for "rotating" the names of the candidates so as not to give the names beginning with A, B, C, etc., for example, an advantage over those beginning with S, T, U, etc.

[3] The Minnesota primary law of 1899, which was first made applicable to the single city of Minneapolis, also provided for secret ballot, and the first trial resulted in a protest against the secret feature of the statute. A Republican candidate for mayor was nominated against the wishes of the organization and the cry immediately followed that "the Democrats did it." When the legislature met again, it reëstablished the old requirement of a

III. Having defined the type of organization which shall be deemed a party and laid down the rules determining membership in the party, legislatures are next compelled to provide for safeguarding the balloting at primaries, and in this connection they have regulated the dates of primaries, polling places, size and shape of ballots, the conduct of the balloting, the count, and the payment of the expenses. The principles now accepted in this field of primary legislation are the oldest and best known, so that they need little more than mention here. There is a uniform tendency to fix the holding of all primary elections of all parties on the same day and at the same place for all territorial divisions coming under the provisions of the law; but this is not universally adopted; some states, for instance, forbid two parties to hold their caucuses on the same day, leaving the matter otherwise to the determination of the committees, subject to certain limits as to time. There is also a tendency to require an official ballot for all parties;[1] this is intended to eliminate the evils connected with the private printing of ballots, such as use of different colors by separate factions to control the purchased vote. It is also a generally accepted principle that the primaries should be conducted by regular officials according to minute provisions as to hours of opening and closing, and counting the ballots; and finally that the expenses should be borne by the same governmental authority that bears the regular election expenses. This last provision was long contested in state legislatures. It was held that while the state should safeguard the primaries of political parties, it should not pay their bills. The same arguments that were advanced in support of the Australian ballot, however, finally prevailed.

IV. The definition of party, the provision of an allegiance test, and the protection of the ballot at the primary are but the preliminaries to the control of party organization and operations. The dominating element in the state party organization is, of course, the central committee (including the chairman), who have charge of marshalling the party hosts in campaigns and have

declaration of allegiance on the part of the party voter and at the same time extended the provisions of the law to other parts of the state. Review of Reviews, Vol. XXIV, pp. 465 ff., October, 1901; A. L. Mearkle, "The Minnesota Election Law."

[1] Printed at public expense.

more or less to say, according to circumstances, about the conduct of party members in legislatures and official places. In many states this important body has taken advantage of the rich opportunities offered to build up a centralized machine, and accordingly our legislatures have sought to bring it under control and fix its responsibility somewhere. In determining the composition and selection of the state committee, the lawmakers have adopted a bewildering variety of expedients which do not reveal any positive tendencies beyond a determination to free the party from the dominance of a machine forced upon it by scheming minorities. These devices are illustrated by the types of regulation described below.

1. The law of a few states, full as it may be in many respects, does not enter this sphere of party organization; but leaves each party to follow its own rules in the constitution of its state committee.

2. The Wisconsin law of 1907 provides a rather unique method of choosing the state chairman and committee. It follows the old Republican practice in New York of using the congressional district as the unit for apportionment, but allows each one at least two members on the state committee. It provides that at twelve o'clock noon on a specified day, the candidates for the various state offices and for senate and assembly nominated by each political party at the primary and the senators of such party, whose terms of office extend beyond the first Monday in January of the year next ensuing, shall meet at the state capitol, and after formulating the platform of the party, shall elect by ballot a central committee of at least two members from each congressional district and a chairman of the said committee.

3. The most democratic method of selecting the state committee is provided by the Illinois law which went into effect on July 1, 1908—later declared unconstitutional.[1] The state central committee shall be composed of one member from each congressional district in the state chosen for a term of two years by the party voters at a regular primary. "The state central committee" runs the law, that there may be no mistake, "shall be composed of members elected from the several congressional districts of the state as herein provided and of no other person or

[1] This portion stands in the reënactment of 1910.

persons whomsoever." Within thirty days after their election the committee must meet and select the state chairman and such other officers as may be deemed necessary to the conduct of party business.

4. The Iowa law of 1907 (section 27) provided that the central committee shall consist of not less than one member for each congressional district and shall be chosen in the state convention of the party regularly organized under the law of the state; but with the internal structure of the committee the law did not interfere: "The state central committee elected at said state convention may organize at pleasure for political work as is usual and customary with such committees, and shall continue to act until succeeded by another committee duly selected."

Descending from the state party organization to the basic unit in the state machinery — the county organization[1] — we discover here a tendency on the part of the state legislature to regulate the most minute details. The form and organization of the county committee is provided by law or left to party rules under the terms of the law. The county committee is usually made up of members specially elected for that office in the townships, precincts, or wards of the county or of *ex-officio* chairmen or members of the committees in the lower subdivisions of the county. The county committee has a chairman, who is generally selected by the committee or by the county convention. The county convention is composed of delegates chosen by party voters in the lower units. Its importance has greatly diminished as a matter of course with the application of the direct primary to the nomination of county officers.

The Direct Primary

Our state legislatures have not been satisfied with their efforts to "democratize" the party organization by requiring the popular election of party officers, and delegates to conventions. As we have seen (above, p. 127) the practice of holding a convention composed of delegates from local units to nominate candidates for office at regular elections developed very early in our history. This system was not without critics almost from its institution, and an abandonment of the plan occurred about 1860, in Crawford county, Pennsylvania, where the

[1] Except, of course, in New England.

local leaders agreed to the selection of candidates by popular vote instead of by a convention. This direct primary was nothing but a pre-election held within the party, previous to the regular election, in order to agree upon candidates in advance. The plan was tried in many other states for local purposes, particularly in Indiana.

About the opening of the twentieth century, a profound popular distrust of the convention had grown up, on account of the fact that such assemblies were all too frequently dominated by corrupt interests seeking control of the government for private purposes. New political leaders, who had appeared with this distrust, failing to capture the convention and the regular party machinery, determined to overthrow it, and extend the principle of the direct primary to all important offices. By 1913, the direct primary for some purposes had been adopted everywhere in the Union, but its use varied widely from state to state.[1]

It is impossible to relate here the recent history of this innovation in party practices or to describe the rich variety of schemes which has been developed. It is sufficient for our purposes to say that there is little sign of any return to the old convention system and that current legislation on the subject relates to alterations in details rather than in the fundamental principle of nomination by direct party vote. Generalizing from a survey of recent statutes, we may say that the direct primary includes the following elements:

(1) A primary election within each party at a stated time previous to each regular election, for the purpose of enabling party voters to express their choice from among the several aspirants for nomination at the hands of the party.

(2) Some method whereby party members who aspire to nomination to various offices may have their names placed upon the official ballot used at the primary election. (*a*) The most popular method has been the use of the petition; under the plan any one who wants to place his name upon the primary ballot as a candidate for a certain office can do so on securing a certain number of signatures to a petition. Sometimes the number of

[1] See the periodical summaries, by Professor Holcombe, in *The American Year Book*, and by Professor Aylsworth in the American Political Science Review.

signatures is a fixed quantity and sometimes (more generally) it is a certain percentage of the party voters within the city, county, district, or state as the case may be. Objections have been made to this system largely on account of the expense attached and the trouble which it entails upon the poor man unable to employ persons to collect signatures. (*b*) A second method is to allow any one who wants to have his name put on the primary ballot as a candidate for nomination to do so on payment of a fee, varying in amount according to the importance of the office. (*c*) A third method (as under the New York law of 1912), is to allow party committees to designate "official" aspirants for nomination and place their names on the primary ballot — with the proviso that other persons may put their names on the ballot by petition. (*d*) A fourth and unique method is that devised by Colorado in 1910. The law of that year "provides for the placing of the names of candidates on the primary ballot not only by petition, but also by 'certificate of designation by assembly.' This designating 'assembly' is a delegate body chosen according to party rules. It is to take only one ballot on candidates for each office. All candidates receiving the votes of at least ten per cent of the delegates are to be certified by the president and secretary as 'designated' to go on the primary ballot. No assembly may declare any candidate its nominee. The names of such candidates are to have a preferred position on the ballot ahead of those proposed by petition."[1] This is a sort of return to a convention, controlled by a direct primary vote on its choices. (*e*) Personal application without paying a fee.

(3) Some method must be devised for determining the order in which names appear on the primary ballot. They may be put in alphabetical order, but it has been found by experience that those who get at the top of the list simply because their names begin with B or C have an actual advantage over those who, through no fault of their own, happened to be named Wilson or Xantippe. The discovery of this fact has led to the practice of "rotating" the names, that is, allowing each aspirant to appear at the top of a portion of the ballots to be determined by the number of aspirants and the number of ballots. This

[1] Professor Alysworth, in the American Political Science Review, February, 1912, p. 65.

practice now seems to be growing in favor. Another method is to place the names of aspirants on the ballots in order of the time of the filing of their respective applications or petitions, but this is objectionable because it introduces an unseemly scramble for places outside the office where such petitions are filed. Still another plan is to determine the position by lot.

(4) The practice has now been established of printing party primary ballots at public expense and of making them as "official" as the regular ballot used at regular elections.

(5) It is necessary to determine what vote shall be required to constitute a choice at the primary.

A majority of the direct primary laws in the United States provide that the person who receives the highest number of votes shall be declared the party candidate for the office which he seeks — thus making it possible to nominate by minority vote. That this is highly undesirable has long been evident even to the most ardent advocates of direct nomination. "It prevents," urges an able critic, "a number of candidates representing the majority sentiment as to party principles from coming into the field as candidates for the nomination for fear the candidate of a minority may be named by receiving a higher vote than any one candidate among the majority candidates. The present primary is, in effect, a convention to which every voter is a delegate and in which the candidate receiving the most votes on the first ballot is the nominee." [1] It affords an opportunity for a man representing a minority and its principles to become the standard-bearer of the whole party, thus violating the first principles of the democratic rule which primary legislation was designed to obtain.

Several attempts are made to obviate this defect. (*a*) In a few instances, a rule is introduced to the effect that any aspirant at the primary must receive an absolute majority of all of the votes cast in order to be victorious. In the South it is a general practice to require an absolute majority and if no aspirant receives such a majority, a second ballot is taken on the two candidates standing highest on the list. (*b*) A second method for overcoming the objections to plurality nominations

[1] For a criticism of the nomination by plurality vote and an ingenious suggestion for a remedy without readopting the convention system, see an article in the American Political Science Review, Vol. II, pp. 43 ff., by Mr. Charles K. Lush.

was devised in the Iowa law of 1907 which sought to obviate the defects in "plurality" nominations by a rather cumbersome set of provisions which taken collectively may be said to constitute a distinct type of direct nomination law. Section 1 of this act provides that the candidates of political parties for all offices which under the law are to be filled by the direct vote of the voters of the state at the general election in November (excepting candidates for the office of judge of the supreme court, district, and superior courts, and including candidates for the office of senator in the Congress of the United States and for the office of presidential elector), shall be nominated by primary election. The aspirant of each political party for each office to be filled by the voters of any subdivision of the county, who receives the largest number of votes shall be declared nominated; aspirants for county, state district, and state offices receiving the highest number of votes, being not less than thirty-five per cent of the total party vote, shall be declared nominated. In case no aspirant of the party for such an office receives the requisite thirty-five per cent of the votes, proper notice shall issue and nomination shall be by regularly constituted convention. (*c*) Another plan, preferential voting, was adopted in Idaho in 1909. "Under this statute an application of the second-choice vote is practically as wide as that of the primary law itself. The elector is to vote for both his first and second choice whenever there are more than twice as many candidates for nomination as there are positions to be filled, *i.e.*, whenever there are more than two candidates for a singular office or four for two places in a plural office or body. An absolute majority of first-choice votes is required to nominate for any office, even the office of Congressman and United States Senator. If no candidate for a given nomination receives a clear majority of first-choice votes, the second-choice votes of each candidate are to be canvassed and added to his first-choice votes. Then the candidate having the largest number of both first- and second-choice votes combined secures the nomination." [1]

A modification of the preferential primary was enacted into law in Wisconsin in 1911. Under that plan, in case no one

[1] See the statement in the American Political Science Review for November, 1909, by Professor Leon E. Alysworth. Washington also has preferential voting (Laws of 1907–1909).

receives a majority of the votes at the primary, the aspirant receiving the smallest number of votes is eliminated and his votes are distributed among the other candidates according to the second choices indicated. This process is continued until some one receives a majority.

(6) It is necessary to have an assembly of some kind to formulate the principles and issues of the party into a platform preparatory to the election. In some cases, a convention is especially authorized to perform this function. Where this function is taken from the convention, it is the practice to leave the formulation of the platform to certain nominees selected at the primary, working in conjunction with certain other officers or official party representatives as in Wisconsin,[1] or to a state or local party committee as the case may be. The convention method has much to commend it; the party through its representatives agrees upon the party principles and then nominates candidates to advance those principles. It must be admitted that no very satisfactory substitute for the convention as a formulator of the party platform has been found.

(7) In order to carry out the theory of equality among candidates for nomination at the primary, Oregon has devised a publicity pamphlet (issued and sent to party members by public authorities), in which each aspirant may lay before his fellow citizens his claims for nomination, by paying a sum proportioned to the size of the office which he seeks, for the use of a certain number of pages. This is supposed to offset, in part, the publicity which the press affords to candidates able to pay for advertising.[2]

(8) The extent to which the principle of the direct primary shall be applied to offices varies greatly from state to state. In most of the western states it is universal and state-wide, that is, it applies to all elective officers from the governor down to local officers, with only minor exceptions. Other direct primary laws are restricted to the nomination of local officers, and the convention in a few states is retained for state purposes only. Some primary laws specially exempt judges from the provisions as to the direct primary and substitute nomination by petition without party interference.

[1] See below, p. 700.

[2] *American Year Book*, 1910, p. 151.

The advantages claimed for this new system of direct nominations are as follows:—

1. It encourages active political work on the part of the rank and file by making it easier for the ordinary party member to exercise some influence on the choice of committeemen and candidates.

2. It brings out a larger vote to the primaries than was customary under the system that provided only for the choice of convention delegates at primaries — a sign of greater public interest which it is desirable to cultivate.[1]

3. It prevents powerful economic interests, such as railway and other corporations, from contributing heavily to campaign expenses and from controlling the nominations to public office.

4. It secures democratic control within the party and prevents it from becoming simply an organized self-perpetuating machine.

5. It secures the nomination of better men by making their nomination depend upon the presentation of their claims to the voters, instead of upon secret manipulations.

The specific criticisms advanced against direct primaries may best be summed up in the language of a Wisconsin opponent:—[2]

1. The personnel of the office-holding class has not been improved; better, more capable, and cleaner men have not been elected to office; public officers are not more devoted to their dutes; the civil service is not improved by the appointment of a better class of employees.

2. Public morals are not elevated by the change in the method of making nominations. Never before in the history of the state was so much money expended by candidates in campaigns as at present. Never before were there so many open charges of corruption and the unlawful use of money.[3]

3. It has disorganized parties and built up personal political machines.

4. The members of the state legislature are split up into factions

[1] The evidence on this point is overwhelming.

[2] Milwaukee Sentinel for November 7, 1909. For this reference I am indebted to Professor R. B. Scott, of the University of Wisconsin. Much of the argument, of course, is mere assertion.

[3] Perhaps the most unique way of meeting the charge that the direct nomination system is expensive to candidates is devised in the Oregon law of June 1, 1908, which limits the amount to be expended by each candidate, forbids other contributions, and provides a system whereby the state prints and distributes the pictures and programmes of each aspirant for office — at his own expense.

and there is no party responsibility for their acts, which has resulted in an endless amount of useless and some harmful legislation.

5. The primary contests have engendered so much bitterness that each election brings about a new alignment of personal political machines. . . .

7. Poor men and men of moderate means cannot become candidates for office under the primary election law when there are contests, except on two conditions. They must face ruin or accept money from others to defray their necessary expenses. If they accept financial aid, they assume obligations no public servant should incur.

8. The electors cannot "vote directly for the men of their choice" at a primary election. They must vote for some man whose name appears on the primary ticket, and that ticket is made up of candidates who have circulated nomination papers or caused nomination papers to be circulated. They may all be office-seekers and objectionable to 90 per cent of the voters, but the voter must submit to make his choice from the self-nominated primary candidates.

9. Never in the history of the state have the enmities engendered by political contests been so bitter as they are to-day. All pretence of the old good-natured rivalry between parties has disappeared from the political arena. Charges of unlawful use of money, of a debauched public service, of actual bribery, of personal dishonesty and political trickery were common during the last session of the legislature. . . .

11. While no attempt has been made to compute the entire cost of the law in operation to the taxpayers of the state, counties, and cities, no one will for a moment dispute the truth of the statement that it has been enormous and that no corresponding benefit has resulted.

12. The law gives a decided advantage to the man in office. In the case of a United States Senator or state officer where the candidate must appeal to the entire electorate, the man who is known to the people as the man in office is, has much advantage over the newcomer. The well advertised candidate, although he is an inferior person, will get the nomination over a less advertised, but better equipped candidate.

13. The placing of names of candidates on primary tickets by petition has developed a new industry in this state during primary campaigns — the circulation of petitions for hire. The party clubs of former years have disappeared; in their places has appeared the mercenary who secures names on petitions for a consideration. This is an exchange of patriotism for pelf.

14. The abolition of all conventions, county, district, and state, has deprived the voters of parties of the opportunity to get together, rub elbows, and become acquainted. In conventions men from different sections of the state met and exchanged views. They explained the merits and abilities of the several candidates for office and they made

"trades" to the advantage of the party ticket in most cases. The conventions were the schools of politics to which many young men went for their education and they had an educative value. All the advantages of this free intercourse, and the exchange of ideas and information, disappeared with the abolition of the convention.

15. The provision for making platforms in conventions made up of candidates for office is a confessed failure. Platforms made in that way do not represent the principles of the party, but are mere "catch vote" affairs. Even the candidates who make them do not respect them, for they go out into the field with platforms of their own, in many cases carefully prepared, printed, and distributed.

16. The law has not dethroned the political boss. If we ever had a real boss in Wisconsin before the primary law we have merely changed bosses. Upon that feature of the question there is no chance for argument. The law complicates politics and any law that does this widens the opportunity for manipulation and increases the activity of the boss. In fact, complicated politics require leadership and political genius.

VI. Nominations for those offices to which the direct primary is not applied are, naturally, left to party conventions, but these are in every case regulated with more or less strictness as to selection of delegates, conduct of meetings, and modes of procedure. The laws of each state allow the nomination by convention of all candidates who are not required to be nominated by direct primaries; and the authorized committees of the parties must give due notice of the primaries to be held for the election of delegates, indicating at the same time the officers to be nominated by the conventions so called. In general, the primaries held for the purpose of choosing delegates must be conducted as other primaries, at a regular polling place, which must be kept open a stipulated time. When the delegates chosen at the primaries are to form a convention for the election of delegates to a state convention or that of a district larger than a county, the party conventions of the several counties must be held the same day.

The provisions of the New York law as developed before the adoption of the direct primary are very full on the election and conduct of local conventions; and the principles evolved illustrate all the main lines of legal control over party assemblies.[1]

[1] On the adoption of the direct primary in 1913 the state convention was abolished as a nominating convention; but left outside the law as a platform drafting body

The term convention is applied to any assemblage of delegates of a party in and for any political subdivision of the state, duly convened for the purpose of nominating candidates for public office, electing delegates to other conventions, electing members of political committees, or transacting any other business relating to the affairs of a political party. Due provision is made for the delivery of certificates of election to delegates chosen at primaries; the apportionment of delegates on a basis of party vote is made obligatory; the room in which the convention is to meet must have ample seating capacity; every convention must be called to order by the chairman of the committee with whom the call originates; the general features of the convention's procedure are determined; and provisions are made for deciding contests over seats. All rights secured to electors, boards, committees, and officials under the act with regard to conventions (among other things) are to be upheld by the courts, and in reviewing any action or neglect relating to conventions, the court is to consider, but is not controlled by, party rules, and shall make such decision or order as justice may require under the facts and circumstances of the case. Service of process on the chairman or secretary of the convention is sufficient.

VII. In connection with the nomination of candidates, especially for state offices, it is a custom of political parties to formulate their principles into a platform. In those states which have not attempted to interfere with the higher ranges of political organization and operation, the function of defining party doctrine is left to the state convention where it originally belonged, in form, if not in fact. The states, however, which have provided for direct nomination of state officers, have also been compelled to consider the question of drafting the party platform. Wisconsin has left this matter to the meeting of the candidates and certain members of the party in official positions at which the state chairman and committee are elected.[1] Kansas constitutes by law an organization known as the party council, composed of "the candidates for the various state offices, for United States Senator, for members of the national house of representatives, for the state senate, for the state house of representatives, nominated by each political party at each primary, the national committeeman, the United States Senators and state

[1] See above, p. 600.

senators of such political party whose term of office extends beyond January of the year next ensuing, and the chairmen of the county committees of the several counties of the state," and this general assemblage of chosen party representatives is charged with the task of drafting the state platform.

VIII. The extensive use of money in elections by candidates and committees, and the notorious instances of large and significant contributions by corporations and private persons, led to a widespread belief that party machinery was merely an adjunct of special interests, while the victor at the polls, to reverse the ancient dictum, belonged to the spoils. It availed nothing, it was argued, to secure to the rank and file legal rights in the selection of delegates and candidates if the militant section of the party continued under the dominance of corporations; and thus the control of money in elections has become the latest phase in the development of the legislative regulation of political parties. Four distinct types of provisions have been devised to secure this control: (*a*) regulation of expenditures of candidates; (*b*) definition and limitation of the financial powers of committees; (*c*) restriction or prohibition of contributions by corporations; (*d*) definition of the objects for which money may be spent. The tendencies in legislative control of financial operations of parties are clearly revealed in the statutes of New York, which, for the sake of brevity, will alone be considered here.[1]

1. Restrictions on candidates. The law of New York limits to a definite sum the amount which each candidate for an elective office may spend and compels him to file within twenty days after the election a sworn statement giving in detail all his receipts and expenditures. Failure or refusal to comply is treated as a misdemeanor and also punishable by the forfeiture of office.

2. Control of political committees. The law defines a political committee as every committee or combination of three or more persons coöperating to aid or promote the success or defeat of a political party or principle or of any proposition submitted to vote

[1] In the development of this type of legislative control New York led the way in 1890 by the enactment of an ineffectual law requiring candidates to report expenditures but leaving committees free. Between 1890 and 1905 no less than fifteen states adopted restrictive measures, usually denominated "Corrupt Practices Acts," and step by step the grand outlines and minor details of a complete scheme of supervision were placed on the statute books See *Senate Document*, No. 86, 59th Congress, 1st Sess., pp. 5–10.

at a public election or to aid or take part in the election or defeat of a candidate for public office. Every such committee must have a treasurer and require him to keep detailed accounts of all money or its equivalent received or promised, and of all expenditures, disbursements, and promises to pay made by the committee. All payments in excess of $5 must be receipted by vouchers showing the amount and object of the expenditure. Within twenty days after the election a statement must be filed, setting forth all the receipts, expenditures, disbursements, and liabilities of the committee, and of every officer, member, or other person acting in its behalf. In each case the statement must include the amount received, the name of the person or committee from whom it was received, the date of its receipt, the amount of every expenditure exceeding $5, the name of the person or committee to whom it was made, and the date. Except in cases where the expenditure is to another committee, the purpose of the disbursement must be clearly stated.

3. Prohibition of corporation contributions. The law regulating corporation contributions, as amended in 1906 (chap. 239) provides that no corporation or joint stock association doing business in the state (except political associations) shall directly or indirectly pay, offer, or use, consent or agree to pay or use any money or property for or in aid of any political party, committee, or organization maintained for political purposes. Aid to candidates for nomination or for office is likewise forbidden as well as all contributions for any political purpose whatever. Violation of the statute by any officer, director, stockholder, attorney, or agent is a misdemeanor punishable by imprisonment for one year and a fine of not more than $1000. No person is excused from testifying or producing evidence on the ground of incrimination, but immunity is assured in such cases.[1]

4. Definition of the objects of campaign expenditures. The culmination of this system of control is to be found in the rather precise definition of the objects for which money may be used in connection with elections. The New York statute of 1906 (chap. 503, sect. 1) includes the following list: rent of halls and expenses connected with public meetings, preparation and publication of various "literary material," compensation for agents to prepare

[1] See also the federal law, approved January 26, 1907, forbidding corporations to make contributions in connection with federal elections.

and supervise articles and advertisements for the press, payment of newspapers for publishing materials, rent of offices and club rooms, compensation of clerks, agents, and attorneys managing the "reasonable business of elections," preparation of lists of voters, personal expenses of candidates, travelling expenses, compensation of workers at the polls, and the hire of carriages. Indeed, this act goes into such detail that it appears to the laymen in politics as an insurmountable barrier to illegal election expenditures; but probably to the eye of an experienced election worker there are plenty of loopholes.

The most unique experiment for controlling party funds was devised by the legislature of Colorado in 1909 by the passage of an act declaring that "the expenses of conducting campaigns to elect state, district, and county officers at general elections shall be paid only by the state and by the candidates." It is made a felony for any other person or any corporation to contribute to any party committee or any candidate for these offices and also it is a felony for any candidate or committee to accept such a contribution. The amount of money which the candidates may themselves personally contribute and expend is regulated by the salaries or fees of the offices for which they are respectively candidates. In addition, the state contributes to each political party twenty-five cents for every vote cast by that party for governor at the last preceding election. The amount is paid over to the state chairman of each party who is made responsible under bond for the proper distribution of this money among the county chairmen in accordance with the strength of the local vote, and also for the proper expenditure of the funds so contributed by the state.[1]

Non-Partisan Politics

While strongly emphasizing the place of party government in American politics the influence of non-partisan organizations should by no means be lost sight of. The non-partisan or independent vote is often the really decisive element, particularly in those cases in which the two great parties are more or less evenly divided; and there is no doubt that there is an ever-increasing proportion of the voters who are independent of party

[1] The American Political Science Review, August, 1909, p. 382. This law was declared unconstitutional by the state court.

organization. In many a national election an appeal has been made to the non-partisan voter. The first Republican platform of 1856 invited the affiliation and cooperation of the men of all politics, and the platform of 1860, after enunciating the principles of the party, appealed for "the coöperation of all citizens, however differing on other questions, who substantially agree with us in their affirmance and support." The Democrats in 1876 appealed to their "fellow-citizens of every former political connection"; and from that day to this the independent element of the nation has not been overlooked in national campaigns.

However, it is in local, and especially municipal, politics that the non-partisan or independent element is strongest. In every great city there is a non-partisan citizens' organization of one form or another. In 1896, the Municipal Voters' League of Chicago was founded to fight corruption in the government of that city. The League is composed of voters scattered throughout the city who express their approval of its purpose and methods by signing cards. The purpose of the League is not the establishment of a new party but the concentration of public opinion and public scrutiny upon the candidates nominated by the other parties. It is, in a word, a publicity committee: prior to each city election it maintains headquarters into which pour suggestions for nominations and criticisms of city officials; as soon as candidates are announced or nominated it sends letters of inquiry to them in order to ascertain what stand they intend to take if elected; and through the campaign it endeavors to secure the widest publicity with regard to the character and policies of the various candidates. It has undoubtedly wielded some influence for good in the city, and party managers in selecting candidates in many wards in the city can no longer ignore its recommendations.

The non-partisan organization of New York is the Citizens' Union, a group of persons united without regard to party for the purpose of securing the honest and efficient government of the city of New York by the nomination and election of candidates or by indorsing the nominations of regular parties whose character and policy the Union can approve. The Citizens' Union, however, differs from the Municipal Voters' League in being a sort of political party with officers, committees, and conventions modeled somewhat on the plan of the older parties. By uniting with the Republican party, which is in a minority in New York

City, it was able in 1901 to contribute powerfully to the election of Mr. Seth Low as mayor; but it was unsuccessful in the next mayoralty contest, and since that time has confined its work largely to political education and the indorsement or nomination of candidates for minor offices. It maintains a representative at Albany to keep a watch on legislation affecting New York City. It issues bulletins from time to time on the questions of local government, and scrutinizes acts of the city administration.

CHAPTER XXXI

TAXATION AND FINANCE

The raising and appropriation of revenues is always one of the leading subjects of controversy in state constitutional conventions. This function of government has been a source of log-rolling and jobbery of every kind, great and small; and the tendency, everywhere manifest, to misappropriate funds and to rush headlong into debt has forced the adoption of many constitutional provisions in behalf of the taxpayer. No safeguard seems to be too minute to be unworthy of a constitutional sanction: the legislature of Alabama must even buy its fuel according to the rules laid down in the fundamental law of the commonwealth.

The early state constitutions gave the legislatures a free hand, but the reckless abandon with which money was raised and spent soon gave the taxpayers pause, and they began to devise plans for stopping one form of malversion after another, only to find the legislature ingenious enough to discover new loopholes. Before taking up the actual methods for raising and disbursing state revenues, it will be necessary, therefore, to consider the general character of the limitations under which the state legislature must work.

Constitutional Limitations

The ancient rule that money bills must originate in the lower house — once so prominent in Anglo-Saxon polity — is now laid down in less than one-half of our state constitutions. A number of them, in fact, specifically state that any bill may originate in either house: "Any bill may originate in either house of the legislature and all bills passed by one house may be amended by the other," runs the New York constitution; but as a general practice the senate concedes to the lower house the right of initiating measures for raising revenues and often general appropriation bills as well.[1] It can hardly be said, however, with due respect

[1] Agger, *The Budget in the American Commonwealth* (Columbia University Studies), p. 22.

for this ancient and honorable doctrine on money bills, that it constitutes any safeguard against careless and corrupt finance in legislatures; and it must be admitted also that it has slowly been declining in public esteem.

Perhaps the most important safeguard against reckless finance is the precise limitation on indebtedness imposed quite generally by the recent constitutions. New York, for example, fixes the debt limit at $1,000,000; and, except for certain urgent reasons — to suppress insurrection and wage war — the legislature can create an additional debt only for a specified purpose, which must be submitted to a popular vote and receive a majority of all the votes cast for and against it.[1] Ohio goes further: after establishing the debt limit at $750,000 the constitution provides that no other debt whatsoever may be created by or on behalf of the state, except debts to repel invasion, suppress insurrection, defend the state in war, or to redeem the present outstanding indebtedness. Coupled with this definite limitation, there is usually a clause requiring the legislature, on creating a new debt, to make provision for meeting it when it falls due.

The various devices for restricting the debt-contracting powers of state legislatures have had a decided effect in reducing and controlling expenditures. The total outstanding debt of all the commonwealths in 1870 was $325,866,898; in 1890, $223,107,883; and in 1902 the total debt of the states and territories was only $234,908,873. Massachusetts in 1909 came first with a debt of $78,097,595; New York second with $41,230,660; and Virginia third with $24,986,959. Ten years later New York stood first with a debt of $236,000,000, and Massachusetts second with a debt of over $125,000,000. Iowa, Kansas, Michigan, Nebraska, New Mexico, Oregon, South Dakota, Wisconsin, and Wyoming were reported as having no bonded debt.

In a majority of states some provision is made for uniformity in taxation.[2] This varies from state to state. In Pennsylvania all taxes must be uniform upon the same class of subjects within the territorial limits of the authority laying the tax. Ohio adheres to a still older principle: "Laws shall be passed taxing

[1] See *Readings*, p. 461.

[2] It is the common practice for the state to exempt from tax the buildings and certain other property of religious, educational, and charitable institutions.

by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money," — except certain public bonds, the property of some institutions, and personal property of any individual to an amount not exceeding $200. In West Virginia, taxation must be equal and uniform throughout the state, and all property, both real and personal, must be taxed in proportion to its value; and no species of property from which a tax may be collected can be taxed higher than any other species of property of equal value.

To secure regularity and publicity in legislative appropriations, it is now quite common to embody in the constitution some or all of the following principles.[1] Money shall be paid out of the treasury only in pursuance of an appropriation by law; every law imposing a tax must specify the object to which the income is to be devoted; the yeas and nays must be taken on the final passage of a money bill and recorded; the credit of the state may not be given or loaned to any private person or association; the governor may veto single items in the appropriation bill;[2] the general appropriation bill may embrace nothing but appropriations for the ordinary expenses of the state executive, legislative, and judicial departments and for some other specific purposes; no appropriation shall be made for a longer term than two years; and no revenue bill may be passed during the last five days of the session.

Legislative Methods

Finances are handled in our state legislatures in much the same way as they are in Congress, and with similar results with regard to confusion and absence of responsibility. There is usually in each house a committee on ways and means and another dealing with appropriations. In about half the states it is the custom to raise revenues under a general law which stands in force from year to year. In these states the appropriations of the legislative sessions are totalled and a rate fixed on the evaluated property that will cover the expenditures. Such

[1] See *Readings*, p. 459.

[2] This power is possessed by more than one-half of the governors and used quite freely, much to the distress of the politicians, but an executive veto of an appropriation is rarely overruled. Agger, *op. cit.*, p. 96; *Readings*, p. 447.

a practice works best, of course, when the general property tax is in use. In the other states, at least some portion of the revenue system is reënacted at each session of the legislature, while the remainder is derived under general and continuing laws. For example, New York has indicated by law certain sources of revenue for state purposes, such as stock transfer, inheritance, franchise, and corporation taxes, and these taxes are collected from year to year without reënactment unless, of course, the legislature sees fit to modify any of the provisions.

As in Congress, so in the state legislature there is no finance minister responsible for the entire budget, and consequently there is the same lack of coördination between income and outgo. In many states where the revenue is derived from a levy on general property, the value of which has been fairly well established by assessment, it is comparatively easy to provide for the revenue after all of the appropriations have been totalled at the close of the session, but this affords no way of checking up expenditures against income while the legislature is making appropriations. Indeed, it is not possible to know the total amount appropriated until some time after the adjournment of the legislature — until the governor has exercised his right of vetoing items. In New York the governor is given thirty days after the adjournment of the legislature in which to exercise his right of veto. He can then cut and slash the budget without giving an account of his doings. Not until he has completed his scrutiny of the appropriation bills is it possible to discover just how much must be raised to meet them.

In the absence of a finance minister in the legislature there is a large variety of methods adopted in attacking the problem of appropriations. The official report of the state auditor, treasurer, or finance officer, or a budget submitted by the governor or a budget board — showing the receipts and expenditures for the preceding year, the balance in the treasury, and the amounts required by the various departments — gives the legislature some clew to the situation, but quite commonly the report of the auditor or the budget submitted by some state authority affords only a starting-point, so that the legislature is soon far adrift. Measure after measure carrying a charge on the treasury is passed, and at the end of the session it is the frequent practice to rush through a large number of bills without any debate.

The appropriation methods of most states, therefore, are very much like the appropriation methods that prevail in Congress.[1] The appropriations — for purposes of simplification — may be divided into three groups: (1) public service appropriations, such as are made to public institutions, commissions, boards, offices, and other agencies of government; (2) general appropriations for legislative, executive, and judicial expenses and for some specified purposes such as the payment of interest on public debt; and (3) miscellaneous appropriations for special objects provided by statute.

The first of these — the public service appropriations — make little trouble, because they are fairly definite in character. There, however, is a constant heavy pressure to increase the amount.

The general appropriation bill is now less trouble than it used to be, for it is, as a general rule, limited by the constitution to certain specific purposes, as indicated above. In many states the vicious practice of attaching to appropriation measures, laws relating to extraneous matters, for the purpose of forcing them through the legislature, is forbidden. The appropriation bills are usually prepared by the committee on appropriations in the lower house, but they are almost always hammered sadly out of shape in the house and the senate.

The miscellaneous appropriations afford splendid opportunities for log-rolling and extravagance, and they seldom receive anything like adequate scrutiny. Furthermore, measure after measure relating to some public purpose or branch of the administration is passed with little or no debate on the cost involved in the execution of the law. These measures are introduced in large numbers by private members of the legislature, and there is generally no person or committee charged with the duty of inquiring into the expense which such laws carry with them. For example, an important change is made in the ballot, involving a large printing and administrative charge; the discussion centres on the political aspect of the question; and perhaps a majority of those who vote for the measure are wholly unaware of the addition made to the expenses of the state. Such a measure, of course, is not an appropriation bill in a strict sense, but its effect is to increase the charges which the legislature and local authorities must meet.

[1] See above, p. 366.

State Budget Reform

The unbusinesslike methods of handling finances in American legislatures were long the object of critical comment by students of public affairs, but it was not until the problem of reform was raised by President Taft's commission on Economy and Efficiency, organized in 1911, that practical steps were taken to remedy the evils which had grown up. In that year Wisconsin and California enacted laws designed to introduce more system into appropriation methods. By 1919 every state in the union except Florida, Missouri, Pennsylvania, and Rhode Island had enacted budget legislation in some form.

I. With reference to the responsibility for the preparation of the state's plan of revenues and expenditures — the budget — four types of authorities are selected or created:

1. The most popular plan is that which makes the governor of the state squarely responsible for laying the budget before the legislature. This is "the executive budget system," which was adopted in Maryland in 1916.

2. The administrative-board type, in which responsibility for presenting the budget is placed on a board composed of state officers, of state officers and members appointed by the governor, or of members appointed by the governor.

3. The administrative-legislative type in which the budget is prepared by a commission composed of state officers and members of the legislature acting in conjunction.

4. The legislative type which leaves the matter entirely in the hands of a legislative committee.[1]

II. With regard to the content of the budget that must be laid before the legislature by the authority specified in the law, there is quite a variety of practice represented in the legislation. The Maryland constitutional amendment provides that the budget shall contain a complete plan of proposed expenditures and estimated revenues and shall show the estimated surplus or deficit of revenues. It must be accompanied by a statement

[1] This survey is based entirely upon an article in the National Municipal Review for September, 1919, by Mr. A. E. Buck of the staff of the New York Bureau of Municipal Research. See also the Report of the Reconstruction Commission (New York, 1919), part iv, for the preparation of which Mr. Buck was largely responsible.

showing: (1) the revenues and expenditures for each of two fiscal years next preceding, (2) a balance sheet, (3) debts and funds of the state, (4) estimate of the state's financial condition at the end of each of the fiscal years for which appropriations are being made, and (5) explanations of the budget by the governor responsible for presenting it.

III. The matter of legislative treatment of the budget after it has been presented has as yet received relatively little attention at the hands of those responsible for the formulation of budget measures, although this is a vital subject. Some lines of control over legislative action are, however, already laid down in certain of the budget amendments and laws; for example:

1. The legislature shall not consider other appropriation measures until the governor's budget has been finally acted upon (Maryland).

2. The legislature cannot add to the governor's budget of estimates for general purposes but may decrease them. All additions and increases must be in the form of special bills, subject to the governor's veto and providing the revenue necessary to meet the additional expenditure to be incurred (Maryland).

3. The governor and administrative officers may, and on call must, appear before the legislature to defend the budget or explain it (Maryland).

4. The standing appropriation committees of the legislature must within five days after the receipt of the budget begin to hold joint and open hearings on the estimates. The governor and his representatives shall have the right to attend and be heard (Virginia).

5. The budget bill shall be the special order of the day for at least five full legislative days and all meetings of the houses for the consideration of the bill shall be open (New York).

IV. Control over expenditures has not been fully worked out. Tennessee forbids spending agencies to draw more money from the treasury than is allowed in the appropriation act. It also requires each agency to keep books showing in detail all receipts and disbursements and keep on file a duplicate of every voucher certified by the comptroller.

The ideal budget plan worked out by Dr. Frederick A. Cleveland and his colleagues in the New York Bureau of Municipal Research, includes among other things:

1. Consolidation of all officers, departments, boards, and agencies into a few departments under the governor, the department heads to constitute the governor's cabinet.

2. Preparation of the budget by the executive branch, the cabinet and governor being held responsible for it.

3. A single-chambered legislature.

4. Consideration of the budget, not by standing committees, but by the legislature in open session as a committee of the whole with the governor and his cabinet present.

5. No additions to be made to the governor's budget except in the form of special bills passed after the executive budget has been adopted, and subject to the executive veto.

6. The governor to enjoy the right to dissolve the legislature and call a new election in case of a fatal disagreement.

Other attempts to secure correct and efficient disbursement of public funds take the form of centralization and systematization in commonwealth and local accounting.[1] For example, in 1909, the Indiana legislature passed an important statute providing for a uniform system of public accounting and for the supervision of all accounts — central and local — by a state examiner appointed by the governor and removed by him at will. The law requires the establishment of a state-wide system of uniform accounts "for every public office and every public account of the same class, of the state, counties, townships, cities, towns, and school corporations and all state institutions. The accounts of every office must show in detail the receipt and expenditure of public funds and the receipt, use, and disposition of public property. Separate accounts of every appropriation or fund of the municipality or institution showing date and manner of payment and the name, address, and vocation of the parties to whom any moneys are paid, and the authority authorizing such payment are required to be kept and verified. Separate accounts for each department, undertaking, and institution, and for every public service industry owned by the municipality, and detailed reports of such public service industry showing the actual condition and cost of service are required."[2]

[1] For the recent Ohio law, see *Readings*, p. 565.

[2] For a complete statement, see the survey by Mr. J. A. Lapp in the Political Science Review for May, 1909, p. 206.

Sources of Revenues

The state usually derives its revenues from four main sources: (1) public property, such as lands and canals; (2) fees charged for licenses, franchises, charters of incorporation, etc.; (3) fines and penalties imposed for violation of the criminal laws; and (4) taxation.[1]

1. For almost a century the chief source of state revenue was the tax imposed at a certain rate upon all property, real and personal, evaluated by local assessors. This state tax, consisting of a certain number of cents on each dollar of valuation, was added to the local rate, collected by the local authorities, and forwarded to the state treasury. Although several states have abandoned in part, or altogether, this general property tax, it still constitutes the main reliance of a majority of the commonwealths, more than eighty-two per cent of the state and local taxes in 1902 being drawn from this source.

The method of laying and collecting the general property tax is practically the same throughout the United States. The property is valued by a local assessor of the town, township, or county, as the case may be. The assessor is furnished with printed blanks containing long lists of every conceivable kind of property — houses, lands, notes, stocks, bonds, pianos, watches, live stock, etc.; and he secures, usually by personal visits, the total value of each class of property possessed by every resident in his area.

From these lists the total value of the general property in the township or county is obtained, and the amount due the state is readily discovered by applying the rate imposed by the legislature. If the township is the unit of the assessment, there is generally a county board charged with the duty of equalizing the values of property in the different units. When it was found that the county authorities habitually undervalued property in order to reduce the burden imposed by the state, the legislatures resorted to the expedient of creating central boards of equalization to impose uniform values for the same classes of property throughout the state, thus connecting the work of the assessors and making each county pay its proper quota into the treasury of the commonwealth.

[1] Agger, *op. cit.*, p. 123.

As the country passed from an agricultural into a commercial and manufacturing stage, there arose serious difficulties in connection with this general property tax.[1] When property consisted of tangible things, lands, houses, live stock, etc., or mortgages on real property recorded at the county seat, it was easy for the assessor to secure a fairly complete and accurate list of the property of each resident within his district. However, when joint stock concerns and corporations came into existence, and persons could invest their wealth in the bonds or stocks of some corporation organized in a distant state, or even in a foreign country, and could lock their papers in a strong box, the assessors could no longer keep track of the property within their local units. There were many other reasons, too, why the states were forced to cast about for some other sources of revenue, but they cannot be discussed here.[2] The result has been a revolution in the tax system of many states, New York having gone so far as to abandon altogether the general property tax for state purposes in favor of inheritance, corporation, income, and other special taxes.

2. The inheritance tax,[3] though long employed in Europe, has found favor in America only within recent years — practically since 1890, but it has now been adopted in some form by more than three-fourths of the states, and its principles are everywhere receiving extended development. The rates are being raised; the progressive rule increasing the rate with the amount of the inheritance is more frequently applied; the exemptions allowed to direct heirs are being lowered; and there is a tendency to apply it equally to real and personal property.[4] Massachusetts in 1919 made an increase of twenty-five per cent in taxes on successions and legacies. All states having this tax are continually improving the administration machinery for collecting it, especially in the methods of appraising estates for taxing purposes. A few states "farm" the collection out to private parties on a percentage basis.[5]

The argument in favor of this tax is that it is easy to collect, falls upon those ablest to bear it, and permits the state to secure

[1] See *Readings*, p. 597.

[2] See *Readings*, pp. 592 ff., for extracts from state tax reports on this whole subject.

[3] See *Readings*, p. 603.

[4] S. Huebner, The Inheritance Tax in the American Commonwealths. Quarterly Journal of Economics, Vol. XVIII, 1904, p. 529.

[5] *Inheritance Tax Laws* (Govt. Printing Office, 1907), p. 47.

a revenue from intangible personal property which so largely escapes under the regular property tax. Moreover, it is held that, inasmuch as the recipient of an inheritance, as such, does not render any service to the state, it is proper for the state to place a special burden on him. The chief argument against the tax is that it is injurious to business where collected in large amounts, because it withdraws capital from private enterprises and devotes it to non-productive purposes.

Wisconsin, California, Idaho, and Massachusetts have progressive taxes — that is, increasing in rate as the inheritance increases — on both direct and collateral heirs. The income from this tax is not very considerable when compared with the entire amount raised by our commonwealths, but it is materially increasing.

3. The income tax has grown in favor since its adoption for federal purposes in 1913 and is now used in many states, including Massachusetts, Virginia, New York, North Carolina, Delaware, Tennessee, and Oklahoma. An attempt is being made in Oklahoma to overcome the difficulty of evasions by requiring all persons to certify under oath the excess of their incomes over the limit of exemption; by authorizing the assessor to send to the state auditor the names of persons who, he believes, have not correctly certified their incomes; and by empowering the auditor to resort to drastic measures for the purpose of ascertaining the truth in the matter. New York compels the tax payer to state the amount of his income reported to the federal government.

4. A most fruitful and popular source of revenue is the tax on corporations now quite generally imposed. This branch of state finance, however, presents so many puzzling problems that it can be considered here only briefly. The taxation of manufacturing corporations doing business at a particular point within the state is comparatively simple: the property of the corporation may be estimated and included in the general mass of property within the state, and perhaps a special tax varying with the capitalization may be imposed for incorporation. However, railway, telegraph, express, street car, and other corporations of a quasi-public character, operating under special franchises or privileges, often monopolistic in character, are in an entirely different class. In taxing them, the legislature is constantly harassed by perplexing problems. A part of the total value of the property of any

one of these corporations is in tangible form in the state, a part in the privilege which it enjoys, and a part, perhaps, is due to operations carried on in other states or in foreign countries. Take, for example, an express company doing business in Ohio: its tangible wealth — horses, wagons, offices, etc. — is relatively slight, but the value of the privilege of doing business is enormous, because it carries goods to and from all points of the Union and the civilized world. In fixing the total value of the business of such corporations within any state, the public authorities are compelled to rely largely on statements made by corporation officials, which are not always entirely satisfactory sources of information; and in laying such taxes, states must also be careful not to come into conflict with the interstate commerce clause of the federal Constitution.[1] To meet these perplexing problems a variety of expedients has been devised. Some states tax all corporations on the actual value of their capital stock; others tax quasi-public corporations according to their gross receipts or their earnings.

5. A large proportion of the states, especially in the South, employ business and professional taxes for state or local purposes, or both. In some of these commonwealths only a few special trades, professions, and occupations are taxed. "At present nearly all of the commonwealths levy license taxes on . . . peddlers, travelling vendors, and various kinds of amusements, primarily for the purpose of regulation or suppression. . . . These taxes are more or less systematically employed for state purposes in Pennsylvania, in Delaware, and in all of the southern states, save South Carolina, Missouri, Arkansas, and Texas, and also in New Mexico, Idaho, and Montana. In practically all of these states and in several others similar taxes are employed — and frequently much more extensively — for municipal purposes. Wilmington, North Carolina, for example, some years ago levied license taxes upon 124 classes of business. The license tax ordinance now in effect in Atlanta contains 466 items, thus permitting few persons other than manual laborers to follow their callings untaxed." [2]

[1] See *Readings*, p. 348.

[2] H. A. Millis, "Business and Professional Taxes, as Sources of Local Revenue," *First National Conference on State and Local Taxation*, 1908, pp. 442–451. An annual review of state taxation legislation and administra-

The disbursements of state governments are generally distributed with more or less variation among the following objects: (1) maintenance of the government in its executive, legislative, and judicial branches; (2) the state militia; (3) health and sanitation; (4) highways; (5) insane asylums; (6) charities; (7) penal institutions; (8) education; (9) interest on public state debt.

The Modern Trend in State and Local Taxation

In a report made in 1918 by a committee of distinguished tax experts selected by the National Tax Association to draft a model system of state and local taxation there is to be found an excellent summary of the drift of American thinking and practice in this field. The committee proposes, it is true, a model tax system for the future, but in so doing it merely brings together the outstanding lines of development during the previous years and projects on that basis the course to be taken in the future. In this "model tax system," the following elements appear:

1. A personal income tax, levied upon all sources of income that can be reached by the state, assessed and collected by the state, even if a part of it is to be returned to the localities. "This tax," reports the committee, "is better fitted than any other to carry out the principle that every person having taxable ability shall make a reasonable contribution to the support of the government under which he lives." The committee also recommends that the rate of taxation be progressive.

2. A tax upon tangible property levied exclusively at the place where such property is located. Having recommended the income tax as a means of reaching income from intangible property (such as stocks and bonds), the committee advises the complete exemption of intangible property from all taxation as property. The committee is of the opinion that a distinction should be drawn between real estate and tangible personal property (such as furniture, jewels, live stock, and other movables) and that the latter should receive a separate classification.

3. The inheritance tax. Though it makes no specific recommendations as to inheritance taxes, the committee goes on record as favoring its use by the American states.

tion is to be found in the *American Year Book*, section on Public Finance, Banking and Insurance.

4. Business taxes. Finding business taxes now being laid by several American states the committee accepts this form of taxation. Such a business tax, the committee suggests, should be laid upon net income — that, rather than volume of business or gross sales, being the best index of a company's ability to pay.

5. Taxes upon consumption. The committee suggests the possibility of deriving some revenue from what may be called taxes on "luxurious consumption," such as automobiles, but does not advise on this point, partly on the ground that such a tax would never yield a large portion of the total state revenues.

A point of special interest about this report is that it proposes a sweeping simplification of our perfect jumble of state taxes and the adoption of a few workable general principles. As to the separation of state and local taxes which a few years before was so much emphasized in American economic writing, the committee holds that in an extreme form it is wholly objectionable. "There is no experience to justify the belief that, if the states turn over to the local governments independent sources of income and adopt the theory that local taxation is an affair of purely local interest, we shall ever have a satisfactory administration of the tax laws by local officials."

On the problem of tax administration the committee makes two recommendations of first-rate importance, reflecting the best American experience. First, it advises that assessment districts should be large enough to justify the employment of at least one permanent official in each such district, and that all assessors, whether appointed or elected, be subject to removal by the state tax commission for wilful negligence or malfeasance in office. Secondly, the committee recommends the establishment of a permanent state tax authority empowered: (1) to administer the income, inheritance, business, and other taxes of state-wide concern, (2) to equalize local assessments, (3) to remove local assessors for inefficiency or misconduct, (4) to supervise the assessment of all property for taxation, and (5) to act as a board of appeal.

As to the exact character of the state authority, whether it should be a commission or a single commissioner, the committee takes no dogmatic position. It does claim that a state tax board made up of men holding other public offices is totally inadequate to the work of tax assessment and supervision. Administration

of tax laws by a single commissioner has been found effective in some states. Many states however are unwilling to vest such large powers over the property of citizens in the hands of one man, preferring to trust such quasi-judicial powers to a board. "We merely say," continues the report of the committee," that neither the system of taxation which we recommend nor any other can be expected to give satisfactory results in states that refuse to place in the hands of some permanent central authority the administration of taxes upon incomes and inheritances, the original assessment of certain classes of property, and general supervisory powers over the assessment of all property subject to local taxation."

It will be seen that the committee sums up the very practical attempts of the citizens of American states to devise a system that will produce enough revenue to meet the rising costs of government and at the same time be comparatively easy to administer. It refuses to propose measures "wholly foreign to American experience and contrary to the ideas of the American people." Nevertheless there are signs of other changes. For example, in 1913 Pennsylvania granted to Pittsburgh and Scranton the right to reduce gradually the tax on improvements to one-half the rate on land, the minimum to be reached in 1925. Advocates of the single tax, or, at all events, a tax on the increment in the value of land, are busy in all parts of the country, and experiments along the lines of those made in England and Canada are possibly not far off.

CHAPTER XXXII

SOCIAL AND ECONOMIC LEGISLATION

From certain quarters the demand is often made that business should be taken out of politics, but any person who has given serious thought to the matter knows that the character of a nation's politics depends primarily upon the character of its business.[1] Politics has to do with the formulation of popular will into law;[2] and every important law affects business — private rights in property. It would be difficult to imagine a single great political issue which does not in some way or another involve business interests. Protective tariff, control of corporations, ship subsidies, labor legislation, tenement-house laws, taxation — all these matters and a hundred more of almost equal importance are in politics and will remain in politics as long as the interests back of them remain in the nation. Manufacturers will favor a protective tariff; the working class will insist on better wages, hours, and conditions of labor; the dwellers in tenement houses will demand more light and better sanitary arrangements; and so on throughout all the various groups into which a nation is divided.

The industries of a nation and economic groups which they create determine fundamentally the nature of the government and the issues which the government must consider. This was fully recognized by the framers of the federal Constitution but has been almost completely lost sight of in the vapid political theorizing that characterized the nineteenth century. "The most common and durable source of factions," said Madison, "has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors and those who are debtors fall under a like discrimination. A

[1] See E. Jenks, *Short History of Politics;* and A. Menger, *Neue Staatslehre;* A. Bentley, *The Process of Government.*

[2] Goodnow, *Politics and Administration.*

landed interest, a manufacturing interest, a mercantile interest, a moneyed interest with many lesser interests, grow up of necessity in civilized nations and divide them into different classes actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of party and faction in the necessary and ordinary operations of government." [1]

The Doctrine of Laissez Faire — No Government Interference

The United States began its career as an independent nation before the steam engine and machinery had revolutionized western civilization. When the Declaration of Independence was issued, the majority of the people of the United States earned their livelihood by farming or in the few scattered industries in which the simplest of tools were used. There were no great factories filled with complicated machinery, no railways, no large cities with their countless thousands of workingmen dependent for a livelihood upon mills and mines. There were no vast accumulations of capital invested in gigantic enterprises, and consequently no need for government interference and regulation.

Most manufactured articles that were not imported from Europe were made by hand in small workshops where the workman was both master and employee. Indeed, many men hoped that the United States would never become a manufacturing nation. "While we have land to labor," said Jefferson, "let us never wish to see our citizens occupied at a workshop or twirling a distaff. . . . Let our workshops remain in Europe. It is better to carry provisions and materials to workmen there than to bring them to the provisions and materials and with their manners and principles. . . . The mobs of great cities add just so much to the support of pure government as sores do to the strength of the human body." [2]

This primitive economic system, resting upon agriculture, handicraft industries, and small business undertakings, had its own justification in political philosophy and jurisprudence. The government should interfere as little as possible with the right of the individual to buy and sell labor and commodities under

[1] For the remainder of this profound paper, see *Readings*, p. 50.
[2] Quoted in Ford, *Rise and Growth of American Politics*, p. 104.

whatever terms and conditions he could secure. Each man, ran the theory, is the best judge of what is conducive to his own happiness and will pursue his own enjoyment and self-interest; the result will be generally good. Competition will keep prices down within a reasonable distance from the cost of production, and any individual, by thrift and industry, may secure the small amount of capital necessary to start in business for himself.

Jefferson was the leading exponent of this doctrine and looked with unconcealed dislike upon the party of strong government led by Hamilton who was willing to use the political system to restore public credit and to advance the interests of manufacturers, merchants, and shippers by protective tariffs. In political theory, though by no means in political practice, the doctrine of Jefferson triumphed; and the notion of the less government the better for the people assumed the leading place in American politics.

In many ways, accordingly, our state governments have favored the development of the class of small property owners to whose interests the individualistic doctrine of the eighteenth century corresponds; and at the same time they have tried to restrain the growth of corporate and other forms of enterprises tending to concentrate wealth in the hands of a small minority. A few states, notably California, Florida, Montana, and Texas, have sought to maintain a class of small farmers by providing that public lands shall be sold or granted only to actual settlers. According to the constitution of California, "the holding of large tracts of land uncultivated and unimproved by individuals or corporations is against the public interest and should be discredited by all means not inconsistent with the rights of private property. Lands belonging to this state which are suitable for cultivation shall be granted only to actual settlers and in quantities not exceeding 320 acres to each settler." The amount of public land to be granted to single individuals and families is strictly limited in several other states; and the laws of all states have abolished the ancient system of primogeniture, according to which the landed estate will pass always to the eldest male heir so that it may be prevented from being broken into small pieces. "Perpetuities and monopolies," runs the constitution of Oklahoma, "are contrary to the genius of a free government

and shall never be allowed, nor shall the law of primogeniture or entailments ever be enforced in this state." A few states even limit the term of years for which agricultural land may be leased; and Oklahoma expressly forbids the creation of any corporation in the state for the purpose of buying, acquiring, or dealing in agricultural lands.

While thus endeavoring to encourage widespread diffusion of farming lands, the states have at the same time lent support to the class of small traders, merchants, and manufacturers by restraining the absorbing power of great corporations and combinations. Consequently, in most states, if not in all of them, combinations and trusts to enhance prices and restrain trade or in any way control the prices of commodities or the charges of common carriers are expressly prohibited and declared to be unlawful and against public policy.[1] "Free and fair competition in the trades and industries," declares the constitution of New Hampshire, "is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it." Several other state constitutions lay upon the legislature the imperative duty of enacting such laws as may be necessary to prevent trusts, pools, combines, and other organizations from enhancing prices of commodities, restraining competition in the various trades and industries, and otherwise blocking "the natural process of reasonable competition." In their endeavor to maintain the individualist system of competition, our state legislatures have loaded our statute books with laws imposing heavy fines and penalties upon persons and associations seeking to restrain trade in any form.

The Control of Corporations

It must be noted, however, that there is a difference between a combination striving to monopolize any particular interest or group of interests and mere corporations which, however large they may be, do not necessarily constitute monopolies, although they may always show a tendency in that direction. Our state lawmakers have gradually come to perceive this distinction, and while attempting to restrain monopolies, have recognized the

[1] Such combinations in restraint of trade were, of course, illegal at common law.

function of corporations in modern economy, and have devised elaborate schemes of law to control their creation, management, and operation.

1. In the beginning of our history it was the practice of the state legislature to create each corporation by a separate law, but the abuses connected with this method were so great that, as a general rule, the legislature is now forbidden to create corporations by special act, and is authorized to pass only general laws providing equal terms for all corporations.[1] According to the constitution of New York corporations may be formed under general laws and will be created by special act only for municipal purposes or in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under the general law. Delaware has sought to control the process of chartering corporations by stipulating that general and special corporation laws must have the approval of two-thirds of all the members elected to each house of the legislature. Georgia has provided that all corporate powers and privileges granted to banking, insurance, railroad, canal, navigation, express, and telegraph companies shall be issued by the secretary of state in accordance with the provisions of law laid down by the legislature. In Virginia the corporation commission, appointed by the governor of the state, issues all charters and amendments of charters for domestic corporations and all licenses to foreign corporations authorizing them to do business in the state. Whatever may be the device adopted to control the creation of corporations the aim is always the same — to obstruct the state legislature in granting special favors to particular corporations.

2. In order to prevent corporations once chartered from claiming perpetual rights under that clause of the federal Constitution forbidding states to impair the obligation of contract,[2] our state constitutions now make provision for the future amendment, repeal, or alteration of general and special laws under which corporations may be created. Some states expressly forbid the irrevocable grant of any franchise, privilege, or immunity. "No law," declares the constitution of Alabama, "making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant of a franchise, privilege, or immunity shall forever remain subject to revocation,

[1] See *Readings*, p. 86 and p. 458.

[2] See above, p. 434.

alteration, or amendment." Nevertheless, some provision is included in many state constitutions to the effect that the right of repealing and amending corporation charters and privileges cannot be so exercised as to impair or destroy vested rights or work injustice to the parties concerned. Subject to the limitation that vested property rights must not be impaired, the state legislature possesses the power to regulate the operations of corporations after they have once been created.

3. The internal management of corporations is controlled by the constitutions and laws of most states. In order to secure to stockholders their individual rights, several states — California, Illinois, Missouri, and Nebraska, for example — have declared that each stockholder shall have one vote for each share. According to the Nebraska constitution the "legislature shall provide by law that in all elections for directors or managers of incorporated companies every stockholder shall have the right to vote in person or by proxy for the number of shares of stock owned by him for as many persons as there are directors or managers to be elected, or to cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them upon the same principle among as many candidates as he shall think fit and such directors or managers shall not be elected in any other manner." In some instances the directors of corporations are made liable, jointly and severally, both to creditors and to stockholders for all moneys embezzled or misappropriated by the officers of such corporation during their term as directors or trustees.

4. To prevent stock-watering it is frequently provided by law that corporations shall not issue stock except for money, labor done, or property actually received to the amount of its par value; that stock and bonded indebtedness shall not be increased except in accordance with the general law and the consent of the persons holding the larger amount in value of the stock; and that fictitious issues of stock and indebtedness shall be deemed void. In those states which have public service commissions, it is a common requirement that any corporation wishing to issue stocks and bonds must file with the commission a sworn and accurate statement showing the exact purposes for which the said stock and bonds are to be issued and must obtain proper authorization.

5. The consolidation or combination of competing corporations is either forbidden altogether, or permitted under strict regulation. In Oklahoma, no public service corporation can consolidate its stock, property, or franchises with, or lease or purchase the works or franchises of, any corporation owning or having under its control a competing or parallel line — except by legislative enactment upon recommendation of the state corporation commission; and furthermore no corporation, chartered or licensed to do business in that state, may own or control in any manner whatever the stock of any competing corporation or corporations engaged in the same kind of business, except such stock as may be pledged in good faith to secure bona-fide indebtedness. Montana expressly declares that no corporation, company, person, or association of persons in the state shall directly combine or form what is known as a trust.

6. Railway corporations and common carriers are controlled by special regulations so numerous and complicated in character that only a few of the general principles may be stated here. Many states declare railways to be public highways and "free to all persons for the transportation of their persons or property thereon under the regulations prescribed by law." The more recent state constitutions expressly authorize the legislature to fix passenger and freight rates and control railways generally in such a way as to prevent unjust discriminations and maintain certain standards of service. According to the constitution of Nebraska, for example, the legislature is instructed to prevent abuses and unjust discrimination and extortion by all express, telegraph, and railroad companies in the state and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of property and franchise.

a. Several years ago a wave of railroad rate regulation swept over the country as the result of the popular cry for a reduction in the passenger charges. In several states a flat rate of from two to three cents a mile was fixed by the legislature, and enforced.[1] In 1907 Illinois, Indiana, Minnesota, Nebraska, and Pennsylvania passed statutes fixing the maximum passenger rate of railroads at two cents a mile. During the same year Iowa and Michigan passed rate bills classifying railroads according to their earnings per mile. In Iowa the roads were divided

[1] In New York the two-cent law was vetoed by Governor Hughes.

into three classes, earning $4000 per mile,$3500 to $3000, and less than $3000 per mile; and the rate fixed at two cents, two and a half cents, and three cents per mile respectively. West Virginia and Missouri based the scale of rates upon the mileage of each road affected. North Carolina fixed the rate at two and a half cents. Alabama and South Dakota fixed the maximum rate at two and a half cents, but authorized the railway commission to make certain classifications of the roads.[1]

b. Railroads are now quite commonly forbidden to discriminate in their charges or facilities between places or persons or in the transportation of the same classes of freight; to issue free passes to state officials and members of the state legislature;[2] to grant rebates and bonuses; and to deny individuals, associations, and corporations similarly situated equal rights in the transportation of persons or property. Most states, either by constitutional or statute law, provide some system of publicity whereby each railway company is required to maintain a public office and publish from time to time statistics relative to its business, profits, dividends, transfer of stock, and the like. Railroads are compelled to maintain fences, regulate grade crossings, put in switches under certain conditions, adopt safety appliances, heat and light their cars, and do many other things for the safety and convenience of passengers. The list of precise regulations imposed upon common carriers in almost any state would fill a volume of reasonable compass.

c. As the controversy over general railway regulation progressed, the obvious unfairness of the flat rate applying equally to all railroads became apparent. As the Wisconsin Railroad Commission in a decision said: "In order to determine whether

[1] "The great tidal wave of railway passenger rate regulation began in Ohio in 1906, swept over the South and Middle West, reached its height in 1907, and since then has been slowly receding. The rising of the wave was marked by discontent with present conditions, a feeling of bitterness, and a strong agitation for reduction in rates. Its fall was marked by injunctions, counter-injunctions, threats, a struggle for state rights, special sessions, compromises, court decisions, some bitterness toward the courts, and a realization that there had been some hasty action. The laws have not all been contested, and where they have been sometimes the state has won, sometimes the railroads have won, and sometimes the struggle has resulted in a compromise." — R. A. Campbell, in the Political Science Review for August, 1907, and November, 1909.

[2] *Readings*, p. 478.

or not a given rate is excessive or otherwise, it is necessary to ascertain: (*a*) the reasonable value of the property of the carrier as a basis for the allowance of income for investment; (*b*) to make the apportionment to the state of its proper proportion of the earnings and operating expenses of the company; (*c*) to ascertain what portion of the gross earnings for the state are derived from intra-state and what from interstate traffic; (*d*) to apportion on some equitable basis the expenses of conducting traffic and other legitimate expenses between the two classes of traffic."

In order, therefore, to be more just in controlling rates and facilities furnished by common carriers, the constitutions and laws of a few states have ordered the physical valuation of railroad property. In Oklahoma the corporation commission must ascertain and keep as a matter of public record the amount of money expended in the construction and equipment per mile of every railroad and public service corporation in the state, the amount of money expended to secure the right of way and, furthermore, the amount of money it would require to reconstruct the road-bed, track, depots, and transportation facilities, and to replace all the physical properties belonging to the railroad or public service corporation. The commission must also ascertain the outstanding bonds, debentures, and indebtedness and the amount thereof; when issued and the rate of interest; when due; for what purposes issued; how used; to whom issued; to whom sold, and the price in cash, property, or labor (if any) received therefor; what became of the proceeds; by whom the indebtedness is held, and the amount purporting to be due thereon; the floating indebtedness of the company, to whom due and the residence of the creditor; the credits due on it; the property on hand; and, finally, the judicial or other sales of the said road, its property or franchises and the amounts purporting to be paid therefor. After having thoroughly analyzed the physical structure of the system, the commission must ascertain the salaries and wages paid by the railroads and public service corporations.

d. Our state lawmakers, however, were not satisfied with laying down minute regulations to be obeyed by common carriers. They found it impossible to control, by positive enactment, all of the multifarious operations of railway and other public service corporations, and they discovered that the same rule could not be applied equally to all companies in all parts of the state.

Consequently shortly after the opening of the twentieth century legislatures began to create corporation commissions variously described as public service commissions, railroad commissions, etc. A public service commission usually consists of from three to five members — in the eastern states generally appointed by the governor and in the West and South quite frequently elected by popular vote.[1]

The powers of the public service commissions vary from state to state, but the general character of this new method of public service control can be gathered from an examination of the recent statute of New York. By that law the state is divided into two districts, the first including what is known as Greater New York and the second the remainder of the state, and in each district there is a commission of one member appointed by the governor with the approval of the senate and removable by the governor, "for inefficiency, neglect of duty, or misconduct in office," after charges are preferred and an opportunity to be heard granted.

Subject to the supervision of the commission are all common carriers; that is, all railway, street railway, express, car, sleeping car, and freight line companies and "all persons and associations of persons whether incorporated or not, operating such agencies for public use in the conveyance of persons or property."[2]

All such common carriers are required to furnish safe and adequate services and facilities at reasonable and just charges not exceeding the limits allowed by law or the orders of the commission. Common carriers must keep open for public inspection their schedules showing rates and fares and charges; they must grant no rebates or unjust discrimination or unreasonable preferences; they must grant no free passes except to certain specified persons. They cannot assign, transfer, or lease franchises, or acquire the stocks and bonds of other common carriers, or issue stocks, bonds, or other evidences of indebtedness without the approval of the commission. The commission is especially empowered to inquire into the general condition and management of all common carriers; to examine their books and papers; to investigate accidents; to fix rates and services; to order repairs and improvements designed to secure adequate services; to order changes in time schedules; to inspect gas and electric meters and

[1] See above, p. 508.

[2] Telephone companies now included.

fix gas and electric rates. The provisions of the law are enforced by drastic penalties; "every day's violation constitutes a separate and distinct offence" involving a penalty of $5000 for common carriers and $1000 for corporations other than common carriers.

It is evident from this necessarily brief and fragmentary review of recent legislation controlling corporations that our states are engaging in a gigantic undertaking requiring the highest type of administrative ability; for, controlling a vast network of railways with their complex and bewildering processes is a task almost as great as their actual operation. The investigations of the commissions and their studies in railway management, their supervision of railway accounting, and their control of schedules and charges have given to the government an insight into their business practices which could have been secured in no other way. Whether this new form of government interference in corporate enterprise be regarded as a barrier to socialism or as a step in the direction of government ownership, it cannot be denied that it is requiring, and will in time develop, a high degree of administrative ability which is indispensable to any solution of the large problem of the relation of government to industry.[1]

7. Banking and insurance corporations, like common carriers, are also usually subjected to special state control. For example, the consolidated banking law of New York, covering almost 150 closely printed pages, contains the most elaborate details regulating the establishment of savings-banks, trust companies, loan associations, building associations, mortgage, loan, and investment corporations, safety deposit companies and personal loan associations, as well as the ordinary banking corporations.

This law provides for the establishment of a banking department under the state superintendent of banks (appointed by the governor and the senate) who is charged with the execution of the laws relative to banking corporations and associations. He is instructed to examine, either personally or through some competent examiners, every bank and trust concern at least twice each year and every savings-bank at least once in two years, making inquiry into the conditions and resources of the corporation, its mode of conducting business, the investment of its funds, the safety of its management, and the security afforded to those

[1] On this subject, see *Proceedings of the American Political Science Association* (1907), pp. 287 ff.

by whom its engagements are held. So strict are the terms of the law and so rigid is the investigation that deposits in the savings-banks of New York are as safe as money invested in government bonds. The state of Oklahoma, however, has gone even farther by passing a law requiring the banking institutions of the state to contribute to a state fund which is used to guarantee depositors so that in case a bank fails the depositors may look to the state for repayment.

New York also has a code of insurance law (more than 150 closely printed pages) which provides for the most detailed regulation of every form of insurance, under supervision of a state department in charge of the state superintendent of insurance appointed by the governor and the senate and charged with the function of making periodical examinations into the conduct of insurance corporations.

Labor Legislation

The great inventions which revolutionized industry have made inevitable not only large corporations and combinations; they have created a new class in society — the working class — dependent entirely upon the sale of labor power to the owners of the machinery of production — in general a toolless, propertyless, and homeless class.[1] With the development of this class have come many special problems, undreamt of by the framers of the American system of government. Like all other classes in the course of human history, the working class has interests and ideals of its own, and is demanding from the state security and protection.

As the doctrines of divine right formerly had no permanent validity for the rising middle class, so the doctrines of individual liberty — trial and indictment by jury and due process of law — do not have the same reality to the working-man that they have to members of the possessing group. Freedom of contract between an employer and an employee with a few days' supplies behind him obviously cannot have the same meaning that it has between persons similarly situated as far as economic goods are concerned. To discourse on the liberty afforded by jury trial to a man who has never appeared in a court but often suffers

[1] See above, p. 633, note.

from considerable periods of unemployment is to overlook the patent fact that liberty has economic as well as legal elements.

Quite naturally this new industrial democracy is evolving a political philosophy of its own, confused and inarticulate in divers ways, but containing many positive elements ranging from minor modifications of the labor contract to the socialist doctrine that the passive ownership of property is merely a special privilege to be eliminated by the use of the government as the collective instrument for the administration of all important forms of concrete capital. With the large implications of this new philosophy, the student of politics need not tarry unless he is of a speculative turn of mind, but its concrete manifestations in the form of labor parties and labor legislation and the precise nature and points of working-class pressure on existing governmental functions constitute a new and important branch of research and exposition.

Generalizing from a survey of the labor legislation of the different states, we may say that the most important laws fall into the following groups:

(1) While, in general, adult male working-men are supposed to be able to take care of themselves in the struggle for existence, our more advanced commonwealths have some legislation relating to this division of the working class. About one-third of the states, including California, Indiana, Massachusetts, Minnesota, New York, and Pennsylvania, have established a compulsory eight-hour day for labor on public works. A recent amendment to the constitution of New York, for example, provides that the legislature may regulate and fix the wages or salaries, the hours of work or labor, and make provision for the protection, safety, and welfare of persons employed by the state or by any county, city, town, or civil subdivision of the state, or by any contractor or subcontractor performing work, labor, or services for the state or any city, county, town, village, or other civil division.

The hours of labor in certain special employments are also regulated by law in a few states; for example, in Colorado the constitution provides for an eight-hour day in mines, smelters, underground work generally, and in certain dangerous employments. During the year 1907 no less than twenty-three states passed laws regulating the hours for certain groups of adult male working-men. These acts limited the hours of labor of conductors,

engineers, firemen, and other employees engaged in railway business. In Indiana, Iowa, Minnesota, Washington, Wisconsin, and a few other states the maximum number of hours for such employees was fixed at sixteen, and in the case of Oregon, at fourteen, per day. During the same year ten states fixed the hours of labor for telegraph and telephone operators and train despatchers, making the maximum in some instances eight hours and in others sixteen hours; and a federal statute was passed limiting the hours of labor of the railway employees to sixteen per day, so far as interstate commerce was involved, and subject to the provision that whenever the state laws establish a less number of hours as a maximum the federal law should not apply.[1]

In regulating the hours of adult labor state legislatures constantly have to take into account the principles applied by the federal Supreme Court in protecting private rights. For example, a law of New York fixing the hours of labor in bakeries at not more than sixty per week, or ten hours a day, was declared unconstitutional by that Court.[2] This view, however, was materially modified in later decisions, particularly in the Oregon laundry case in 1917 (Bunting *v.* Oregon, 243 U. S. 426).

(2) The women and children form a separate division of the working class and are safeguarded by special laws. More than one-half of the states, including Colorado, Connecticut, Massachusetts, Nebraska, New York, Pennsylvania, and Wisconsin, have limited the hours of labor for women in the important branches of industry. The precise number of hours varies from state to state, but at the present time the general tendency is to fix it at from forty-eight to fifty-four per week. Many states vary the length of the working day more or less in accordance with the nature of the industry. The Massachusetts law not only fixes a maximum number of hours per week for women employed in certain industries, but also forbids the employment of women between 6 P. M. and 6 A. M. in textile manufacturing establishments.

With a few exceptions every state in the Union prohibits the employment of children under a certain age in factories, and furthermore limits the hours of those children (above the age

[1] In addition to regulating the hours of labor a number of states have provided pension funds for certain classes of public servants, such as firemen, teachers, policemen, and library employees. [2] See *Readings*, p. 617.

limit) actually employed. Night work for children is also forbidden in the most progressive industrial commonwealths.

Generally speaking, the child-labor laws tend to fix the minimum age limit at about fourteen and require for each child a minimum of education. It has been pointed out, however, by a careful observer that the arbitrary limit of fourteen or fifteen years does not necessarily indicate the ability of a child to engage in regular employment and that a physical test in place of an age limit would be better calculated to safeguard children.

Two departures in the legislation relative to women and children were made about 1912. In that year, Massachusetts enacted a law establishing a commission to fix the wages of women and children in industries. In any trade in which the commission finds the wages too low to maintain the female employees properly, it may set up a wage board to ascertain the minimum wage which should be paid, and it may request the employer to pay the said wage. If the employer refuses, the commission may publish that fact to the world through the newspapers, but it cannot impose any penalties on him for his refusal.[1] Other states have taken up this reform and it is being widely advocated by social workers.

A second departure of significance was made in 1911 when Illinois and Missouri enacted laws providing for mothers' pensions to be paid to widows who have small children and do not have the means necessary for their support. Other states followed in quick succession. The principle behind this law is that by providing pensions for such mothers their homes need not be broken up and the children sent to public institutions. The cost to the public is perhaps not much greater than the old system of support in charitable institutions, and the advantages of a mother's care may be secured. It is customary to grade the amount of the pension on the basis of the number and age of the children.[2] Over thirty states have now adopted it.

(3) While fixing certain standards of hours and wages in specific cases, the states now attempt to improve, by legislation, the conditions under which work is carried on. Factories and

[1] The wage commissioner found that 65.2 per cent of the candy workers, 29.5 per cent of the saleswomen, 40.7 per cent of the laundry workers received less than $6 a week. *American Year Book*, 1912, p. 407.

[2] For an annual review of labor legislation, see the *American Year Book*.

workshops must be ventilated; dangerous machinery must be safeguarded; penalties are placed upon employers using unsafe and improper scaffolds, ladders, and mechanical contrivances in building work; the cables and gears of elevators must be inspected and maintained at certain standards; fire escapes must be provided for factories more than three stories in height; suitable time must be allowed for meals in factories; boilers generating steam and heat for factory purposes must be kept in good order and periodically examined; public laundry work must not be done in living rooms, and all laundries must be kept in clean condition and free from vermin and impurities of a contagious nature; tenement houses cannot be used in the manufacture of a large number of articles, and tenement-house manufacturing generally is closely restricted; certain standards of cleanliness must be maintained in rooms used as bakeries; mines must be ventilated, timbered, and provided with suitable outlets; proper sanitary arrangements must be provided in factories and mercantile establishments, — such is the general character of the labor law of New York, and it has been duplicated in the more advanced industrial states. Nevertheless, in matters of this kind we are behind the most advanced nations of Europe; and our laws are often not enforced.

(4) At the outset of an examination of labor legislation relative to compensating workmen and their families for industrial accidents, we are impressed with the lamentable conditions which undoubtedly prevail. The condition existing several years ago, thus described by Professor Seager, formed the basis for an agitation which within the last decade has brought about a large amount of remedial legislation:

> Fourth of July orators delight to point out the various fields in which we excel, but there is one field of which they say very little, and that is that we kill and injure more working-men in proportion to the number employed on our railroads, in our mines, and factories than any other country in the world.
>
> On our railroads three times as many employees are killed and five times as many are maimed each year as on the railroads of the United Kingdom, and the situation in our coal mines is almost as bad, for there each year we average a loss of three and one-third out of every thousand persons employed, whereas in England the average is two, in Germany two and one-half, while in Belgium the average is one

The prevention of these accidents is a pressing social problem, but it is not of this that I wish to speak to-night, but of the method we have of caring for the 100,000 working-men who are maimed, the 20,000 widows and the 60,000 orphans that are left, as a result of these accidents. Our method of caring for them is neither just nor generous. We leave them to the mercy of a law that has been discarded as out of date in practically every other civilized country but ours.

There are five things in our present law that are wrong. In the first place, it is fundamentally wrong in principle; second, it fails signally to remedy a serious social problem; third, it involves appalling waste; fourth, it embitters the relations between the employer and the employed; and fifth, the system is morally demoralizing.

Statistics show that more than one-half of the accidents that occur are due to the hazards of industry; they happen, not because the employees are careless, but because of the nature of the industry. Statistics submitted by the insurance companies show further that on the average not more than forty-five per cent of the money employers pay out in premiums is actually paid to the injured employees in the settlement of claims. About one-third of this goes to the lawyers, the result being that only about thirty per cent of what the employers' liability costs the employer is of any benefit to the injured.

These and other defects in the actual operation of a system of employers' liability based on negligence have led all important countries except the United States to abandon it. Since 1884, when Germany introduced her compulsory accident insurance system, twenty of the leading nations of the world have adopted the plan of putting on industry the cost of indemnifying all the victims of industrial accidents except those who owe their injuries to their own deliberate and wilful negligence.

The principal reason for imposing on the employer the cost of indemnifying the victims of all accidents is that accidents, as a rule, are not due to personal negligence, but to the nature of the industry which the employer carries on for his own benefit. The cost of insuring his plant and machinery is now a regular item in the expense of production; under a system of workmen's compensation the cost of insuring employees from accidents becomes such an item.

The industry is compelled to pay for men's maimed bodies and shortened lives in the same way that it pays for worn-out plants and used-up raw materials. Both are alike costs, necessary to the prosecution of industry for which consumers, for whose benefit industry is carried on, should be made to pay.

Within recent years the injustice of throwing the burden of liability for injury and death in industries upon the defenceless

working-man and his family has been slowly recognized by state lawmakers. A few more advanced state constitutions stipulate that the right of action to recover damages for injuries resulting in death shall never be abrogated and the amount recoverable shall never be subject to any statutory limitation. Oklahoma provides that no such rights under the constitution can ever be waived by contract, expressed or implied, and adds that the defence of contributory negligence or assumption of risk,[1] which would throw the burden upon the injured working-man, shall in all cases whatsoever be a question of fact for the jury to decide.

Under the common law employers were only liable for damages when they were themselves personally responsible — that is, they were not liable for accidents due "to unpreventable causes or to the carelessness of the employee himself or one of his fellow-employees." This common-law doctrine of the "fellow-servant," so far as it affects the liability of the master for injuries resulting from acts or omissions of any other servant or servants of the common master is, in Oklahoma, expressly abrogated as to every employee of every railroad company, street railroad company, interurban railroad company, and every concern engaged in mining.

About 1910 there set in a decided movement in the direction of shifting the burden of accidents from the unfortunate victims to the industry in which they worked. This movement was manifested in legislation of two types.

In the first place, state after state abolished the "fellow servant" rule and required employers to pay injured workmen compensation in certain amounts according to the nature of the case, whenever the accidents were due to the negligence of the employers, his agents, or employees, or to the necessary risk or danger inherent in the industry. In New York, where a law of this character was declared unconstitutional by the state court, a constitutional amendment was adopted in 1913 authorizing the legislature to enact laws safeguarding the lives, health, and safety of employees and permitting compensation laws with or without an insurance plan. In 1914 it was reported that such legislation existed in one-half of the forty-eight states.

In the second place, there was developed out of the principles of compensation legislation schemes of *industrial insurance* ad-

[1] Above, p. 560.

ministered not by courts of law in the form of damage suits against employers but by industrial commissions in the form of automatic grants to injured workmen on the establishment of a case within the terms of the law. In 1917 there were thirty-six states which had industrial insurance acts of some kind.

As soon as this type of legislation was well advanced, the American Association for Labor Legislation proposed a plan for insurance against sickness and invalidity. The plan of the Association included; (1) universal and compulsory insurance against sickness for all those below a certain level of income; (2) a system of voluntary insurance for all those above the level fixed by law; (3) cash benefits and medical service in case of sickness; (4) the framing of legislation designed to prevent sickness and improve conditions affecting the health of employees.[1]

Under the laws of Great Britain, all "employers are required to compensate, according to a fixed scale, workmen or their families for accidents sustained in connection with their employments and resulting in at least two weeks' disability, unless such accident is due to the serious and wilful misconduct of the workman himself."[2] The result of placing the responsibility for compensation upon employers in the United Kingdom has been to compel them to take out policies in industrial insurance companies against such risks and to regard this insurance a part of their normal working expenses, just as fire insurance has been regarded for many years.

(5) More than three-fourths of the states have established labor bureaus and factory inspection for the purpose of enforcing the provisions of the labor law with regard to hours and wages, and assisting in the maintenance of the sanitary and other standards required by legislative enactment. A few states, Wisconsin, Massachusetts, and New York, have labor boards with large powers in regulating labor conditions.

Certain elements are common to most of the laws establishing labor bureaus. Provision is made for the appointment of a labor commissioner or chief officer. The selection is usually political and frequently made from the ranks of union labor. The duties of a labor bureau are various but they usually include

[1] The publications of the Association for Labor Legislation (New York City) are a mine of information on all subjects pertaining to labor legislation.

[2] Seager, *Economics: Briefer Course*, p. 345.

the inspection of factories and mines with a view to the enforcement of the labor laws, and the collection of statistics of labor, manufactures, and industrial accidents.[1] In some states, the administration of free employment offices and the law relative to mediation and arbitration is placed in charge of the labor bureau.[2] It is thus apparent that the labor bureau is now one of the most important branches of state administration.[3]

(6) Several states have made provision for free public employment offices, especially for the great cities, designed to help relieve the problem of unemployment. It can hardly be said that these employment offices have been very successful; and they have often been regarded with suspicion particularly by union workmen, because they may be used by employers in times of strikes to secure non-union workmen.

(7) In order to help in preventing strikes and in mitigating the bitterness of industrial disputes, more than one-half of the states have made either constitutional or statutory provision for mediation, arbitration, and conciliation. The Massachusetts board of arbitration and conciliation was established in 1886. During the first eleven years of its existence over three hundred industrial controversies were submitted to it for consideration and action and more than one-third of these controversies were settled in accordance with the recommendations of the board.

The law of New York provides for a bureau of mediation and arbitration in charge of the second deputy commissioner of labor as chief arbiter, under the supervision of the commissioner of labor. The law provides that whenever a strike or lockout occurs

[1] It appears that Massachusetts was the first state to establish a bureau of labor statistics — in 1869; from 1870 to 1879 nine new bureaus were created, from 1880 to 1890 seventeen bureaus, and from 1890 to 1899 nine bureaus. Massachusetts Labor Bulletin (1908) No. 15, p. 116.

[2] It is a general practice throughout the United States to appoint labor commissioners and factory inspectors from among the workers of the political party in power. An investigation made recently showed that practically every labor commissioner owed his office to party services. The result of this is great uncertainty in the tenure of office, with its inevitable results. In order to exchange opinions and help establish uniformity in the standards of labor legislation the chiefs and commissioners of labor bureaus have formed a national organization and hold annual conventions.

[3] See *The American Year Book, 1910*, p. 444.

or is seriously threatened, a representative of this bureau shall, if practicable, proceed to the locality promptly, and endeavor to effect an amicable settlement by the way of mediation.

The state board of mediation and arbitration consists of a chief mediator as chairman and two other officers of the department of labor free at the time to act. Any grievance or dispute between an employer and his employees may be submitted to this board for determination and settlement. Such submission must be in writing and contain a detailed statement of the dispute and its causes, and also an agreement to abide by the determination of the board and to continue at business or work during the investigation. Upon such submission, it is the duty of the board to hear testimony and investigate the matter in controversy and, within ten days after the completion of the hearing, render a decision, a copy of which is to be served upon each party to the controversy.

In several states boards of mediation and arbitration may on their own initiative investigate the causes of industrial disputes, but in no state has arbitration been made obligatory upon employers and employees. It is difficult to estimate the services which may be rendered by these boards of arbitration and conciliation. Such a board, says Professor Seager, "with power to intervene on the instant it learns of a labor dispute may at times succeed in effecting a settlement by simply bringing the parties together and suggesting possible bases of agreement, at the same time that it removes misunderstandings and assuages wounded feelings. Failing in this, it may, by making public the findings in the case and indicating clearly the settlement which appears to it fair, bring such pressure to bear upon the less conciliatory disputants that a compromise will seem better than a fight and a prolonged strike or lockout will be avoided. Thus, although without power to enforce its award, a state board of conciliation and arbitration may often prevent strikes and lockouts." [1]

In spite of all that has been done by our states to improve the condition of the working class, the United States lags far behind the advanced countries of Europe, especially Great Britain. Several reasons have been assigned for this backward state of American labor legislation.[2] In the first place, the Am-

[1] *Economics: Briefer Course*, p. 318.

[2] See an excellent article by B. M. Herron, "Factory Inspection in the United States," American Journal of Sociology, January, 1907.

erican individualist doctrine that any man can rise out of the working class has blinded the American people to the fact that, however great may be the opportunities for individuals to rise, the working class must yet remain, and that upon its standards of life, its intelligence, and physical vitality the very fate of the nation depends. In the second place, while the United States has been transformed into an industrial nation, the notion of the older agricultural life that anybody has a right to work as long as he pleases, under any conditions he is willing to accept, has pervaded our legislatures.

In the third place, the distribution of powers in our federal system is such that practically all regulation of industry and labor is vested in the state governments, and each state government, in endeavoring to improve the conditions of labor within its borders, must take into account the fact that too strict rules will only result in driving industries out into the more backward states where they are not hampered by such regulations in behalf of the employees. Finally, in the United States, there is no such opposition between the representatives of organized capital and the representatives of agricultural interests as existed in England and led the latter to champion with great zeal labor legislation which did not in any way affect them adversely. Inasmuch as the working class in the United States has not, up to this point, seen fit to elect its own special representatives in any large numbers to state legislatures, it has had to depend upon the sympathies or fears of the politicians, and the special laws which it has won have been largely concessions to the labor vote.

Public Health Standards

Government interference with private persons in the maintenance of general standards of public health and safety is a matter of comparatively recent development. It was not until well on toward the middle of the nineteenth century that the health laws of the various states went much farther than to regulate in a very ineffective manner the methods of controlling smallpox and other contagious diseases. The cholera epidemic of 1848 and 1849 marked the awakening of public interest in the whole question of sanitation and its relation to general welfare. In the latter year Massachusetts appointed a commission to investigate the sanitary

conditions of the entire state and the report of that commission with recommendations for public health boards lies at the basis of the sanitary regulation not only of Massachusetts but of many other important states in the Union. One after another the states began to create boards of health; and by the close of the century forty-two states and territories had such boards.[1]

The public health law of a fairly advanced commonwealth will provide for a state department of health with large powers and for county, city, town, and village boards of public health. In New York there is a department of public health headed by a commissioner, appointed by the governor and senate. He is charged with taking cognizance of the interests of health and life of the people of the state and all matters appertaining thereto; he makes inquiries into the causes of diseases; investigates the sources of mortality; studies the problem of the effect of localities, employments, and other conditions upon the health of the persons affected; he obtains and preserves information useful in the discharge of his duties or which may contribute to the promotion of health and security of life; he may compel the attendance of witnesses and force them to testify in matters before him; he may reverse the regulations and ordinances of local boards of health under certain circumstances.

The commissioner of health has the power to examine into nuisances and questions affecting the security of life and health in any locality. On order of the governor of the state, he must make examinations, and when the governor, on the report of the commissioner, discovers a public nuisance he may order it to be abated, or removed.

The health law of New York further provides for local boards of health and for health officers in the several cities, villages, and towns of the state and vests in them a large and arbitrary power over life and property whenever the maintenance of public health is at stake.

A complete public health code will also forbid the manufacture and sale of adulterated foods and drugs. Under any advanced law food is regarded as adulterated if any substance has been mixed with it so as to reduce, lower or injuriously affect its quality or strength; or if any inferior or cheaper substance or substances

[1] Reference: S. W. Abbott, *The Past and Present Conditions of Public Hygiene and Medicine in the United States*, pp. 9 ff.

have been substituted wholly or in part for the article; or if any valuable constituent of the article has been wholly or partly abstracted; or if the article be an imitation or sold under the name of some other substances; or if it contains wholly or in part diseased or decomposed animal or vegetable substances, whether manufactured or not, or, in the case of milk foods, is a product of diseased animals. Most health laws further provide for maintaining certain standards in drugs and for a certain degree of purity in liquors and confectionery.

The department of health frequently takes cognizance of the interests of public health as affected by the sale or use of food and drugs and adulterations thereof and makes all necessary inquiries and investigations relating thereto.

The health law of New York also regulates and provides for the inspection of all the potable waters in the state so as to prevent contamination from sewage and other sources; it creates a quarantine and a health officer at the port of New York; it regulates the practice of medicine, dentistry, veterinary medicine, and surgery; it provides for the registration and regulation of pharmacies and drug stores; the supervision of the practice of chiropody, undertaking and embalming, and optometry; the vaccination of school children; and the visitation of institutions for orphans, destitute, or vagrant children or juvenile delinquents.

Closely connected with the health law of the state are the provisions controlling the construction and maintenance of tenements. A well-developed tenement-house law will require certain precautions against fire through regulations relative to the construction of halls, stairways, and fire-escapes; it will define the percentage of a lot which may be occupied by buildings and define the minimum of light and ventilation. The law of New York, for example, prescribes the minimum of window area for each room in new tenement-houses and also the minimum size of rooms; regulates minutely the sanitary accommodations to be provided for tenements; endeavors to maintain certain standards of cleanliness by penalizing landlords who neglect their property. The right to commence new buildings and to alter the structure of old buildings in the large cities is always subjected to some control by the tenement-house or health department.

Public Charities

All the states in the Union make more or less provision for central and local institutions for the public care of the insane, deaf and dumb, blind, and other defectives who are without private means. The constitution of Oklahoma provides that educational, reformatory, and penal institutions and those for the benefit of the insane, blind, deaf and mute, and such other institutions as the public good may require, shall be established and supported by the state in such manner as the legislature may prescribe; and it furthermore requires the several counties of the state to make provisions under general state laws, "for those inhabitants who by reason of age, infirmity, or misfortune may have claims upon the sympathies and aid of the county." The state of New York also maintains special institutions for feeble-minded children, feeble-minded women, idiots, epileptics, inebriate women, crippled and deformed children, persons afflicted with incipient pulmonary tuberculosis, decrepit and mentally enfeebled persons, juvenile delinquents, unfortunate women, unprotected girls, and Indians.[1]

For a long time it was the practice of each state to administer each institution by means of a separate local board endowed with large powers of management. At the present, however, there is a strong tendency in the direction of centralizing all the institutions of a single class under the control of one state board. Some states have gone so far as to place the management of both charitable and penal institutions under one board. The arguments advanced by the Illinois Efficiency and Economy Committee in favor of this system are as follows:

1. It makes possible uniformity in the organization and administration of the various institutions . . . the standardization of services, salaries, accounts, methods, and reports.

2. It promotes economy by the elimination of duplicate officials and employees, by establishing a more vigorous supervision over financial expenditure, and by centralizing the purchase of supplies.

3. It promotes efficiency by the centralization of power and responsibility. A single central board giving its whole time to its public duties can keep in close touch with conditions in the different institutions and bring all to common standards.[1]

[1] For a full and scientific treatment of institutional administration see J. M. Mathews, *Principles of American State Administration.*

Education

Education in the United States is regarded as a purely state and local function. Although Congress has aided the development of education, especially in the western states, by the reservation of school lands and by grants from the sale of public lands, every attempt to set up anything like a national control over education has been steadily resisted. Even the project of establishing a national university, which has been before Congress since the early years of the republic, is probably no nearer realization than it was fifty years ago. It is true there is a bureau of education in the Department of the Interior, but the commissioner in charge of that bureau has no administrative control over the educational systems of the several states. His functions are limited principally to a study of educational problems and the publication of useful educational data. In this respect, therefore, the United States differs from most countries of Europe where the educational systems are largely dominated by the central governments. It is partly due to this state autonomy that the educational systems of the several commonwealths, while founded upon certain American ideals, possess a high degree of effective adaptability to local needs.

The principle that "knowledge and learning generally diffused throughout the community are essential to the preservation of a free government and of the rights and liberties of the people," is embodied in many of our state constitutions; but several of them go farther and provide in more or less detail for the establishment of state educational systems. The constitution of New York, for instance, requires the legislature to provide "for the maintenance and support of a system of free common schools, wherein all children of this state may be educated," — a provision to be found in some form in the constitutions drafted since the middle of the nineteenth century. Some other states go even farther. For example, the fundamental law of Oklahoma orders the legislature to provide for the compulsory attendance at some public or other school, unless other means of education is afforded, of all the children in the state between eight and sixteen years of age, who are sound in mind and body; and fixes the minimum education for such children at three months in each year. Under the

constitution of Nebraska, the legislature must arrange for free instruction, in the common schools, of all persons between the ages of five and twenty-one years. The constitutions of several western states also provide for a state university, and in a number of cases, institutions of higher learning have been established by the legislatures under general constitutional provisions — such as that found in Indiana, making it the duty of the legislature "to encourage by all suitable means, moral, intellectual, scientific, and agricultural improvement."

Some constitutions, however, go into more detail with regard to education. Wyoming, for example, makes provision for a complete and uniform system of public instruction, "embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, and such other institutions as may be necessary."

A number of state constitutions set aside special funds for educational purposes. For instance, Nebraska declares to be perpetual funds for common school purposes the amount granted by Congress on the sales of lands in the state, all moneys arising from the sale or lease of sections sixteen and thirty-six in each township of the state (or lands selected in lieu thereof), the proceeds of lands and property accruing to the state through escheat and forfeiture, fines, penalties, and license moneys arising under the general laws of the states and certain other specified revenues.

Generally speaking, the constitution of a commonwealth will also stipulate that neither the state nor any subdivision thereof may allow the use of its property, credit, or public money, directly or indirectly, in aiding and maintaining, other than for examination and inspection, any school or institution of learning wholly or in part under the control or direction of any religious denomination or in which any denominational tenet or doctrine is taught.

The supervision of the educational interests of each state is usually invested in a commissioner or superintendent of education, sometimes acting in conjunction with a board and sometimes alone. Generally speaking, the state superintendent or commissioner of education is rather narrowly controlled by state laws and has very little power to prescribe the subjects taught in the schools or methods of teaching. It is usually the duty of the

state superintendent to visit the various parts of the state; to coöperate with county superintendents and other local educational authorities in developing uniformly higher standards; to collect statistics and other data; to devise plans for the improvement of the educational system; and to make reports to the governor and legislature upon which new legislation may be based. Quite commonly, state normal schools and institutions for the training of teachers are placed under the supervision of the state superintendent, but the state universities stand on a more independent basis.

The powers of central boards of education vary greatly from state to state. In some instances they are merely charged with the guardianship of the school funds and school lands; in others, their functions are merely to advise the state superintendent or commissioner on educational policies; in others, they are given a large authority over the whole system of the state, including the power to make rules and regulations affecting the curriculum, books, methods of instruction, examinations and appointment of teachers.

For the most part the central administration of each state limits its activities to general matters, but the legislature of the commonwealth enacts the laws upon which the whole public system must rest; and, under the terms of the constitution, provides the way in which funds for educational purposes may be raised and apportioned among the various localities. The state also looks after the establishment and maintenance of state universities and normal schools. In the East, where there are a number of colleges and universities older than the Republic itself, the states makes little or no provision for higher education except for the training of teachers. In some instances, however, private institutions, such as Cornell, Yale, and Harvard, are recognized by the state and aided, at least in the development of certain departments. In the East, therefore, college and university work is generally regarded as a peculiar field for private institutions, and it is held that the people should not be taxed to furnish higher education to the relatively few who can take advantage of it. On the other hand, in the West the state university is looked upon as the crowning institution of a great democratic educational system, and the western states are steadily working toward a system of free education beginning in the kindergarten

and running through the graded and high schools and the colleges to the universities.

During recent years there has been a marked development, particularly in the state universities, away from the classical models of earlier days. The university is becoming less of a scholastic institution and more of a public service institution. This does not mean that the liberal arts are receiving less attention; on the contrary there probably never has been a more genuine interest in all things which enlarge the intellectual life than at the present time, and one of the newer interests of university administration is to make the opportunities for general culture available to a wider circle of the population than ever before. For this purpose, extension departments are now being founded by the greater institutions, state and private. In Wisconsin, for example, centres are established throughout the state, and university lecturers are sent out to deliver regular courses on cultural as well as technical and practical arts. A correspondence school is also organized at the university so that the humblest citizen with a little leisure at his disposal may undertake systematic study under expert guidance.

In addition to encouraging the diffusion of knowledge on those subjects which are commonly regarded as scholastic in character, the universities are widening the curriculum to include the practical arts and sciences: technology, engineering, agriculture, and domestic science. No subject calculated to throw light upon the problems of the world's work is being neglected. In university laboratories experiments are being conducted along all lines which may improve the quality and enlarge the quantity of wealth produced.

Moreover, special arrangements are made for those busily engaged in a life work and unable to take regular courses of instruction in the university. Wisconsin, for example, has established "short courses" for farmers, which they can take during the weeks when their farm labors are the lightest. The extension department also makes provision for carrying to the agricultural and manufacturing districts by means of lectures and correspondence the practical bearing of high researches upon the problems of farm and factory. Thus the college, originating as social centre for the cultured few, may become the servant of the whole community in its effort to combine

wisdom, efficiency, and labor. In all past ages culture has rested upon slavery and exploitation; American democracy is trying the great experiment of combining learning with what the Greeks regarded as the "vulgar" pursuit of earning a living.

The central government of the state also controls by special and general acts the incorporation of colleges, seminaries, and institutions of higher education. It is from the state that institutions of learning secure the power to grant degrees.

The actual administration of education, however, is, for the most part, regarded as a local matter and is vested in county, city, township, and other local authorities. Outside of New England we usually find a county superintendent or a county board of education, or both, standing in somewhat the same relation to the county schools in which the state superintendent or board does to the whole system of the commonwealth.[1]

Provision is generally made by law for the division of the county into school districts, but usually township lines are not crossed in the formation of these districts. In fact, the township is often the lowest administrative division of the state educational system and the administration of educational matters in the township or town is left to the t ustee or to some special authorities locally elected.[2] Sometimes, however, there is a board of trustees, and sometimes a single officer, in every school district. The administration of education in cities is, as we have seen, vested in a board, sometimes appointed, but quite generally elected by the voters.[3]

Large experiments have also been made in extending the advantages of education beyond the schools and universities to the broad masses of the people by the establishment of public libraries, travelling libraries, and extension systems. More than two-thirds of the states, including New York, Michigan, Wisconsin, Indiana, and Minnesota, have endeavored to carry education beyond the limits of the schoolroom through travelling libraries. Indiana, for example, has provided for the establish-

[1] In New England the local school system is generally in the hands of school committees or supervisors elected in the several towns.

[2] Townships are frequently divided into school districts with a special authority in each.

[3] Above, p. 624.

ment of such libraries, and the authorities in charge have prepared small boxes containing books on special subjects and also books of a general character. These libraries are circulated throughout the state through local associations at a nominal cost, and in 1907 the public library commission of that state reported that there were then in circulation nearly two hundred travelling libraries containing about six thousand books and that there were some three hundred local library associations scattered throughout the state.

The Problem of Financing Education

In the increasing expenditures of American states and cities there is no more important and weighty item than the appropriation for education. With the rising cost of living that accompanied the Great War, it became necessary to increase the salaries of teachers, but in few instances does it appear that the increase was commensurate with the increase in rents and commodities. One effect of this condition of affairs was to drive thousands of teachers out of the schools into business, industrial, and professional life. At the same time, the country had pressed upon its attention as never before the value of the schools in promoting national solidarity and raising the standards of citizenship, particularly in assimilating the alien to American life. "A period of thinking nationally has had its effect on education as on few other things. Illiteracy, ignorance of the English language, poorly prepared teachers, physical difficulties, and low salaries for educational work are all felt as national problems in a sense that was not the case before the war."

The cost of maintaining a system of education that will measure up to the high ideal of the nation is staggering, and the states and cities, perplexed as to ways and means of meeting the situation, have turned to the federal government for aid. For a long time it had been the practice of progressive states to grant large sums from the central treasury in aid of local schools, thus bringing the poorest and most backward districts up to a higher standard. It was easy to carry the idea over into the national field. Congress, by the Morrill Act of 1862, had stimulated the states to advance education, by dedicating millions of acres of public lands to the support of colleges for instruction in agriculture and mechanical arts. In 1917, by the Smith-Hughes Act Congress made

an appropriation of money to aid the states in the promotion of education in agriculture, trades, domestic economy, and industry and in the preparation of teachers in such subjects. The act created a federal board for vocational education charged with the duty of coöperating with the states and aiding in the administration of the law. States were to receive help from this federal fund only on condition that they complied with the terms of the law, by making appropriations equivalent to the amount allotted them by the national government and creating state boards to coöperate with the federal board. Within a few months forty-two states had complied with the terms of the law, and at the present time all states have taken advantage of the offer. In 1918 the federal board reported: "From now on vocational education is a matter to which the energies of both state and federal governments will be directed. Its establishment means much for the defence as well as the prosperity of the people of the country. It means an immediate extension of our secondary public school system so as to furnish a more practical education to all. It means furthermore that this extension will be carefully planned and ordered." With this example before them, the friends of a greater and more effective public school system turned to the federal government for assistance of a similar character for all branches of education.

APPENDIX

CONSTITUTION OF THE UNITED STATES

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. 1. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes [1] shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.[2] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the representation from any State, the

[1] See the 16th Amendment, below, p. 765.

[2] Partly superseded by the 14th Amendment. (See below, p. 764.)

executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SECTION 3. 1. The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof, for six years; and each senator shall have one vote.[1]

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.[1]

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SECTION 4. 1. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5. 1. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

[1] See the 17th Amendment, below, p. 765.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECTION 6. 1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

SECTION 7. 1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8. 1. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

2. To borrow money on the credit of the United States;

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

7. To establish post offices and post roads;

8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

9. To constitute tribunals inferior to the Supreme Court;

10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

13. To provide and maintain a navy;

14. To make rules for the government and regulation of the land and naval forces;

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SECTION 9. 1. The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3. No bill of attainder or *ex post facto* law shall be passed.

4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.[1]

5. No tax or duty shall be laid on articles exported from any State.

6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another.

7. No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

8. No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION 10. 1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II

SECTION 1. 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

2. Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[2] The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of

[1] See the 16th Amendment, below, p. 765.

[2] The following paragraph was in force only from 1788 to 1803.

the number of votes for each ; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President ; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote ; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.[1]

3. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes ; which day shall be the same throughout the United States.

4. No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President ; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

5. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

6. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

7. Before he enter on the execution of his office, he shall take the following oath or affirmation: — "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. 1. The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have

[1] Superseded by the 12th Amendment. (See p. 763.)

power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3. 1. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION 4. The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION 2. 1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more States; — between a State and citizens of another State; [1] — between citizens of different States, — between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court

[1] See the 11th Amendment, p. 763.

shall have appellate jurisdiction, both as to law and to fact, with such exceptions, and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3. 1. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV

SECTION 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SECTION 2. 1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION 3. 1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for pro-

posing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

3. The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in Convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names,

GO: WASHINGTON —
Presidt. and Deputy from Virginia

Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the legislatures of the several States pursuant to the fifth article of the original Constitution.

ARTICLE I[1]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

[1] The first ten Amendments adopted in 1791.

ARTICLE II

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

ARTICLE III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI[1]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII[2]

The electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots, the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

[1] Adopted in 1798. [2] Adopted in 1804.

ARTICLE XIII[1]

SECTION 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV[2]

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV[3]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

[1] Adopted in 1865. [2] Adopted in 1868. [3] Adopted in 1870.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI[1]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII[2]

The Senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII[3]

After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the states by Congress.

[ARTICLE XIX[4]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

The Congress shall have power by appropriate legislation to enforce the provisions of this article.]

[1] Passed July, 1909; proclaimed February 25, 1913.

[2] Passed May, 1912, in lieu of paragraph one, Section 3, Article I, of the Constitution and so much of paragraph two of the same Section as relates to the filling of vacancies; proclaimed May 31, 1913.

[3] Submitted by Congress in December, 1917. Requisite number of ratifications received on January 16, 1919; proclaimed January 29, 1919.

[4] Submitted by Congress in June, 1919. Ratification still pending, February, 1920.

GUIDE TO CURRENT LITERATURE ON GOVERNMENT AND POLITICS

The difficulties of keeping fairly abreast the current developments in American government and politics are almost insuperable, but the student fortunately has several handy aids. *The American Year Book*, published annually by Appleton, gives a survey of changes in politics and government and also of legislation on social, economic, financial, labor, and commercial matters. *The American Political Science Review*, a quarterly publication, contains in addition to articles on political matters, a number of periodical surveys of direct primary, labor, and other legislation; in each number also there is a guide to important articles on government and politics in current magazines. *The Political Science Quarterly* contains articles on current political matters and a biennial survey of political history. The *Annals of the American Academy of Political and Social Science* and the occasional supplements are invaluable for the student of government. In 1912, the National Municipal League founded *The National Municipal Review*, which is devoted mainly to municipal affairs and publishes, in addition to articles, bibliographical and other guides to current municipal affairs. It is not necessary to refer the student to the *Guide to Periodical Literature* and to Poole's *Index to Periodical Literature* which furnish handy guides to all magazine literature. A few selected articles are given below simply to encourage the student to acquaint himself with some of the leading technical journals and to illustrate the method of independent search for current materials.

Articles on the Federal Government. — The problems of a national budget are discussed in the *Proceedings of the American Political Science Association* (1912), by F. A. Cleveland, p. 47; F. J. Goodnow, p. 68; and W. F. Willoughby, p. 78. "Some Aspects of the Vice-Presidency," by H. B. Learned, *ibid.*, p. 162. See the annual review of American Politics in *The American Year Book*. A review of the literature of the Great War by E. R. Turner is in the *American Political Science Review* for February, 1915, p. 142. Each issue of the *Review* contains an Index to current literature of political interest.

Articles on State Government. — See the current tables and survey by J. M. Matthews in *The American Year Book*. "State Political Reorganization," by Herbert Croly, *Proceedings of the American Political Science Association* (1911), p. 136; "Suggestions for a State Budget," by S. Gale Lowrie, *ibid.*, for 1912, p. 88; "The Theory of the Nature of the Suffrage," by W. J. Shepard, *ibid.*, for 1912, p. 106; "The New Rôle of the Governor," by J. M. Matthews, *American Political Science Review*, Vol. VI, p. 216; "The Operation of the Recall in Oregon," by J. D. Barnett, *ibid.*, Vol. VI, p. 41; "The Working of the State-wide Referendum in Illinois," by C. O. Gardner, *ibid.*, Vol. V, p. 394. *The Annals of the American Academy of Political and Social Science for September, 1912*, devoted to articles on the initiative, referendum, and recall. For articles on state administration

reorganization by J. S. Young, J. D. Barnett, H. G. James, F. E. Horack, A. W. Holcombe, and C. A. Dykstra. See the *American Political Science Review* for May, 1915. For complete summary to date see A. E. Buck's article in the *National Municipal Review*, September, 1919.

Articles on Municipal Government. — Among the important articles in the first volume of the *National Municipal Review* are those on commission government by a committee of the National Municipal League, p. 40; by Martin Gemuender, p. 170; and by W. B. Munro, p. 562; and by E. S. Bradford, p. 372; "The Conservative Aspects of the Recall," by H. S. Gilbertson, p. 204; "The Taxation of Franchises in California," by Carl C. Plehn, p. 337; "German Municipal Socialism," by Karl F. Geiser, p. 355; "What Wisconsin is Doing for Its Cities," by Ford MacGregor, p. 378; "Preferential Voting," by R. M. Hull; "Municipal Home Rule in California," by T. H. Reed, p. 569; "The Actual Workings of the Initiative, Referendum, and Recall," by John R. Haynes, p. 586; "Socialism in California Municipalities," by I. B. Cross, p. 611; "How the Chicago and Cleveland Railway Settlements are Working Out," by D. F. Wilcox, p. 630; "Recent Graft Exposures," by C. R. Atkinson, p. 672 (also Vol. II, p. 439). In the second volume may be noted the following articles: "Research and Reference Bureaus," by E. M. Sait, p. 48; "The Valuation of Real Estate for Taxation," by W. A. Somers, p. 230; "Efficiency in City Purchasing," by W. R. Smith, p. 239; "Constructive Housing Reform," by Carol Aronovici, p. 210; "The New York Subway Contracts," by D. F. Wilcox, p. 375. "The Assessment of Real Estate," by Lawson Purdy, forms a valuable supplement to the *National Municipal Review* for September, 1919.

Articles on Local Government. — *The Proceedings of the American Political Science Association* (1911) contain articles on the relation of city to county government (Massachusetts), by O. C. Hormell, p. 61; (New York), by A. C. Ludington, p. 73; (Chicago), by F. D. Bramhall, and (St. Louis), by T. P. Young and P. V. Long, p. 109; the *Annals of the American Academy of Political and Social Science for May, 1913*, devoted to local government.

Articles on Politics and Party Government. — See the annual survey in *The American Year Book*, by A. N. Holcombe and the current notes and surveys in *The American Political Science Review*. "The Democratization of Party Finances," by W. E. Weyl, *Proceedings of the American Political Science Association* (1912), p. 178. On the history and working of the direct primaries, see "Primary Elections in Iowa," by F. E. Horack, *Iowa Applied History Series*, Vol. I, p. 260; "Corrupt Practices Legislation in Iowa," by H. J. Peterson, *ibid.*, p. 303; "Direct Primaries in Missouri," by Isidor Loeb, *Proceedings of the American Political Science Association* (1910), p. 165. There is an article on the Presidential Preference Primary in the *American Political Science Review* (August, 1915) by F. W. Dickey. On the operation of proportional representation in Ashtabula, Ohio, see an article by R. C. Atkinson in the *National Municipal Review* for January, 1920.

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J. P. Cotton, *The Constitutional Decisions of John Marshall.* 2 vols. 1905. Contains the decisions of Marshall dealing with constitutional questions, with a brief introductory note to each case.

Herbert Croly, *The Promise of American Life.* 1909. A brilliant essay on the tendencies of American politics.

The Federalist. To be secured in many editions. A collection of papers on the federal Constitution, by Hamilton, Madison, and Jay, which should be in every student's library.

Finley and Sanderson, *The American Executive and Executive Methods.* A study of the offices of President and Governor.

K. F. Geiser, *Democracy versus Autocracy.*

F. J. Goodnow, *The Principles of the Administrative Law of the United States.* 1905. The organization of the executive in national, state, and local government, and judicial control over it.

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